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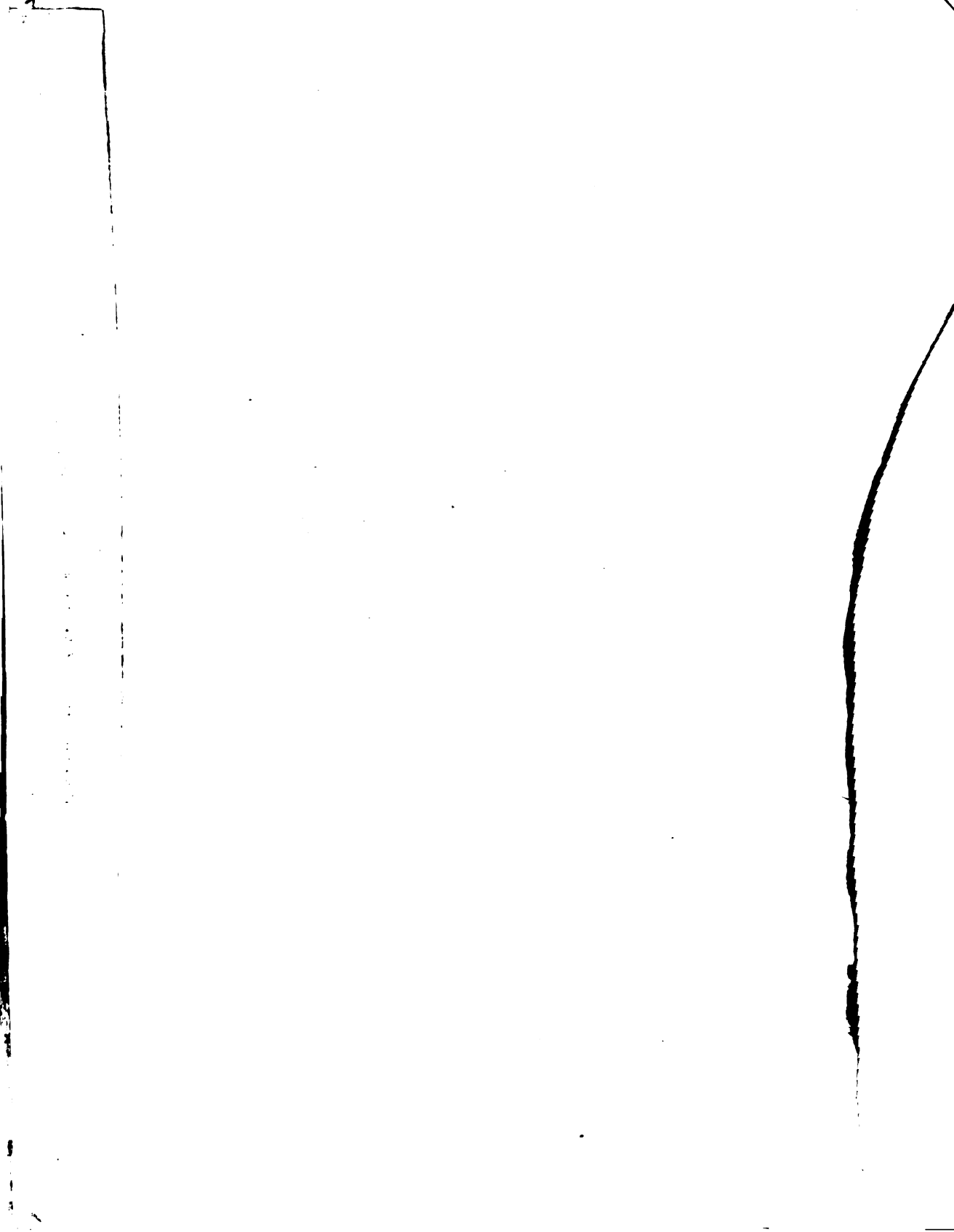
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A COMPLETE
Encycloped *ia*
OF
Virginia Law

BEING

A Concise but Comprehensive Alphabetical Presentation of
the Present Common and Statute Law, Civil and
Criminal, of the Commonwealth

BASED ON

The Monumental Works of Dr. John B. Minor; the Works,
Brochures, and Notes of Judge Martin P. Burks and
Professors Charles A. Graves, William M. Lile, and
Raleigh C. Minor, and other Treatises, Text-
Books, Expositions, and Repositories of
Virginia Law, Modernized to Date by
Recent Virginia and other Decis-
ions, the Code of Virginia 1919,
and Subsequent Acts of
the General Assembly in-
cluding Acts 1922

WITH

Complete Practical Revised **FORMS** Adapted to the Present Law

BY
SAM N. HURST

AUTHOR OF

"Hurst's Guide & Manual," "Hurst's Annotated Virginia Digest" (9 vols.), "Hurst's
Annotated Virginia & West Virginia Criminal Digest," "Hurst's Annotated Virginia
Constitution," "Hurst's Form Book for Virginia Attorneys," "Hurst's Index and Direc-
tory of Virginia Law," "Hurst's Annotated Pocket Code of Virginia" (4 eds.), etc.

IN TWO VOLUMES

Volume II—H to Z

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PREFACE

This is to introduce to you the 9th child (counting volumes and editions, the 24th and 25th or twin children) of our rather large legal family. Conceived many years ago, and matured and brought forth with much meditation, serious pondering in heart, patient anxiety, and arduous labor, this is the proudest product of a somewhat fruitful family, especially as four have become deceased or decrepid, ravages of some thirty years, and only two remain in full vigor—the Form Book and the Pocket Code, the latter having four times, once every seven years (in 1898, 1905, 1913 and 1920), been rejuvenated by an age-healing bath in the fabled fountain of youth.

Need of This Work

The present confused state of the common and statute law of Virginia, owing to the absence of any comprehensive and systematic presentation of the corpus juris of Virginia since the days of John B. Minor, the famed Blackstone of Virginia, who some thirty years ago covered (by his last editions) the entire field of legal jurisprudence, law and equity, civil and criminal, in his four volumes (six books) of "Institutes" and his briefer work on "Crimes and Punishments,"—affords a sufficient apology for this undertaking, and makes the time opportune indeed for the realization of the dream of our younger manhood.

While this brief but complete "Encyclopedia of the Law of Virginia" is of course less pretentious than Minor's great monumental work, yet according to the measure of our humbler gifts we hope this may prove our monumental achievement in the field of law-authorship, where we have labored so assiduously for the past thirty years.

and utility to the profession, like many subjects in the first volume of the Code, are presented very briefly—sometimes by a mere reference to them, yet always noting the amendments of the sections to date. In treating purely statutory subjects that have never received judicial construction or text-book treatment, we have collected all the kindred statutes, distributed them under appropriate heads, and made pertinent observations thereon, so as to afford a clear, obvious, and comprehensive presentation of the subject, ready to the hand of the busy practitioner.

Comprehensive Nomenclature

Aside from the usual legal nomenclature, which we have used, covering the whole field of legal jurisprudence, we have added many interesting and more or less new headings, such as Animals, Fowls, etc.; Anti-Trust Law; Architect and Builder; Baggage; Cities and Towns; Delinquent Tax Sales; Employer and Employee (also embracing the "Workmen's Compensation Law"); Fraudulent and Voluntary Conveyances; Hotels, etc.; Licenses and License Taxes; Married Woman's Property and Other Rights; Minors, Infants, or Children; Real Estate Agent; Taxation and Tax Bill; Unincorporated Associations or Orders; etc., etc. A few times we have somewhat overstepped the proper scope of this work, but we will surely be excused for giving such practical and interesting subjects as Copyrights; Due Process of Law; Interstate Commerce Law; Labels or Prints; Patents; Pure Food and Drug Laws, and the like; and general utility closely allied to the law compelled us to include Parliamentary Law. To make the work as complete as possible we have descended even to the very minutiae of law. While we do not discuss (either with or without the prefix) mosquitoes or fleas, we do treat the equally impressive but more useful subject "Bees." And notwithstanding any possible political ambition, we have, "without the fear or favor of man", actually treated "Dogs"! and further 'to promote domestic tranquility,' we have stated the rights and duties of "chickens"!—concealed, however, under the more pacific heading, "Animals, Fowls, etc."

Complete Practical Forms

This Encyclopedia contains also, as stated in the title, "complete practical forms, common law and statutory, adapted to the present law." These are given at the end of the several subjects respectively. These forms are one of the most important features of the work, which embodies not only the relevant forms of "Hurst's Forms for Virginia Attorneys," carefully adapted to the present state of the law, but it also contains all the new, rare, and unusual forms recently collected by the author from the legal profession and other sources, and forms specially compiled by him under the new statutes (as, in case of attachments, search warrants, etc.), which were at first intended for a separate publication heretofore announced as "Hurst's Supplementary Forms."

Cross-Reference Index

Though the subjects are treated alphabetically under the common legal headings, yet to make the work quickly and easily accessible, we have appended a complete "Cross-Reference Index", in which is given almost every subject that may occur to a lawyer or even a layman, and which cites you at once to the heading desired. We believe the attorney will by this index and Encyclopedia find a statutory subject quicker than in an unduly elaborate but non-subalphabetical index.

West Virginia Edition

The Virginia and West Virginia law, common and statutory, being practically the same, this Encyclopedia will prove almost equally serviceable to the West Virginia practitioner; and we, therefore, have published a West Virginia edition.

The Author's Valedictory

Fully sensible that this Encyclopedia could have been made better by abler hands, perhaps where we have lacked in superior ability, we have made up in unexcelled industry and unsurpassed experience. With all its imperfections which a critical though charitable profession may detect, we are nevertheless absolutely confident this Encyclopedia will prove very

helpful indeed to the attorney as his desk and court companion in his every-day practice.

Profoundly grateful to the profession for their generous patronage for the past thirty years, and pleading for this perhaps his last and proudest production, a like or even liker reception and appreciation—even hoping this work may find an important and permanent place among handy and useful tools in the lawyer's workshop; and humbly and sincerely thanking Almighty God for this high privilege of serving Him and humanity in an effort to present those "rules of civil conduct, commanding what is right and prohibiting what is wrong", whereby our citizenship may the better submit themselves to "the powers that be", which we are told, "are ordained of God",—the author begs in this last line to erect a stone in grateful remembrance of a great, noble, honest, and honorable profession.

July, 1922.

SAM N. HURST.

HABEAS CORPUS

- § 1. Nature and purpose of writ
- § 2. Useful forms under "Habeas Corpus"

§ 1. Nature and purpose of writ.—Habeas Corpus means, to have the body, and is a writ directed to the person detaining another and commanding him to produce the body of the person so detained at a certain time and place, with the day and cause of caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.

This writ issues only where a person "is detained without lawful authority" (§ 5848 of Code). It is only an inquiry into the legality of the detention, arising from want of authority or jurisdiction, void process, or other illegal cause. The writ is used in both civil and criminal cases; in the former often to obtain by parent or guardian the custody of children. It is more often used in criminal cases. The writ is not to correct errors or to try cases on their merits (however, when for children the right to the custody is tried), but only to restore liberty unlawfully withheld. On this writ the guilt or innocence of the party is not considered, but only the legality of the imprisonment. The writ lies where the warrant of arrest, commitment, or indictment is void either as to form, or in not charging any offense at all, or in being issued without authority or jurisdiction. The writ also lies where the imprisonment is based on an unconstitutional act, or where the sentence of a court is not authorized by law, or where a prisoner is denied his right to give bail, or his bail is fixed at an unreasonable amount.

The writ issues by any circuit or corporation court, or a judge in vacation, to any person applying therefor by petition, "showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority" (Code, § 5848); and is directed to the person in whose custody the prisoner is detained, and made returnable as soon as may be before that court or judge, or any other court or judge (§ 5849 of Code). For further procedure, see sections 3850-9 of the Code.

For constitutional guarantees of this writ, see Virginia Constitution, § 58, and U. S. Constitution, Art. I., § 10.

§ 2. Useful forms under "Habeas Corpus".—

NO. 1. PETITION FOR WRIT OF HABEAS CORPUS. (Code, § 5848.)

To the Hon. J. L. M., Judge of the Circuit Court of _____
County, Virginia:

Your petitioner, D. D., of _____, Va., would respectfully represent unto your honor that he has been arrested, and is now detained and confined in the county jail of _____ county, under and by virtue of an alleged order or process (state what, or if no process of commitment, say, without any process or order of law whatsoever). Your petitioner alleges that the said order or process is void, for that the said J. T., who issued the process, was without jurisdiction and authority of law to do so, and that he is therefore detained in said jail without lawful authority.

Your petitioner, therefore, prays that your honor will award to him the writ of habeas corpus *ad subjiciendum*, directed to the sheriff of said county, who by virtue of his office is the keeper of the said jail, requiring him to bring before you the body of your petitioner, together with the causes of his detention, so that the same may be inquired into, and relief afforded your petitioner according to law.

C. D., by Counsel.

Virginia, County of _____, to-wit:

Sworn to by C. D. before me, J. T., a justice of the peace for said county, this the _____ day of _____, 192—, in my county and state aforesaid.

J. T., J. P.

NO. 2. ORDER GRANTING WRIT OF HABEAS CORPUS. (*Idem*; 2 Barton L. Pr., p. 1248.)

On the petition of C. D., stating that he is detained (or that some one else, naming him, is detained) without lawful authority, and it being made to appear by affidavit (or other evidence) that there is probable cause to believe that he is so detained in the custody of the sheriff of _____ county, a writ of habeas corpus *ad subjiciendum* is granted him, directed to the said sheriff, commanding him to have the body of the said C. D. before this court (or *judge*) at _____ o'clock on the _____ day of _____, 192—, at _____, together with the day and cause of his capture and detention.

NO. 3. WRIT OF HABEAS CORPUS. (*Idem*.)

To the sheriff of _____ county:

You are hereby commanded to produce before the _____ court of _____, at the court-house thereof, at _____ (or *before the judge of the _____ court of _____, at _____*), at _____ o'clock on the _____ day of _____, 192—, the body of C. D., and have then and there the cause of his capture and detention.

C. C., Clerk (or J. L. M., Judge).

No. 4. ORDER DIRECTING DISCHARGE.

(Code, § 5853, 2 Bart. L. Pr., p. 1252.)

This day C. D. was brought into court by the sheriff of _____ county, in obedience to the writ of habeas corpus awarded on the _____ day of _____, 192—. And the said sheriff certified that the said C. D. was taken into his custody and detained by virtue of (here recite the return), and for no other cause, which being considered, the court (or *judge*) is of opinion that the said cause is illegal and insufficient. It is, therefore, ordered that the said C. D. be discharged from custody.

HEALTHSee *Nuisance*

- § 1. Wrongs affecting the health
- § 2. Statutory provisions

§ 1. Wrongs affecting the health.—Wrongs against one's health, for which there may be an action for damages, are such as selling one bad provisions or liquors, or adulterated drugs; or negligently supplying an injurious drug or medicine instead of an innocent one, or one less hurtful; or exercising a noisome trade, which infects the air in the neighborhood; or unskillful practice by a physician or surgeon; or nuisances of any kind—see *Nuisance*. Where the injury cannot be properly compensated by damages, an injunction lies to stop it; as, where the erection of a mill-dam which will likely generate malaria and produce disease in one's family, or the stoppage of a drain or sewer is likely to produce similar results or typhoid fever, or in the case of other nuisances—see *Nuisance*.

§ 2. Statutory provisions.—For chapter of the Code as to "State Board of Health and local boards", see §§ 1486-1514, and Acts 1920, p. 87, amending § 1486, and Acts 1918, p. 178, affecting §§ 1489-90; as to "control of communicable diseases," see §§ 1515-54, and Acts 1918, p. 446, affecting § 1554, and Acts 1918, p. 486 (prohibiting public drinking cups)—see also, *Nuisance* and *Animals, Fowls, etc.*; as to "hospitals", see §§ 1555-60; as to "vital statistics," see §§ 1561-84, and Acts 1922, amending §§ 1564, 1569; as to "hotels," see §§ 1585-

1607 and title *Hotels*; as to the "practice of medicine" see §§ 1608-1639, and Acts 1920, p. 247 amending § 1615, Acts 1920, p. 11, amending § 1636, and Acts 1922, amending § 1616; as to the "practice poropathy", see Acts 1918, p. 361; as to "prevention of blindness from ophthalmia neonatorum, etc.", see Acts 1918, p. 771; as to the "practice of dentistry", see §§ 1640-54, and Acts 1920, p. 233, amending § 1646; as to "practice of pharmacy", see §§ 1655-1702, and Acts 1918, p. 428, affecting § 1693; as to "dairy and food commissioner", see §§ 1155-1288, and Acts 1920, p. 547, amending §§ 1215-17; as to "professional nursing of the sick", see §§ 1703-14 and Acts 1922, amending §§ 1704, 1706, 1707-8, 1714; as to the "practice of embalming, and the transportation and disposition of dead bodies," see §§ 1715-36; as to "drainage and pollution of streams," see §§ 1737-96, and Acts 1920, p. 607, amending §§ 1738, 1743, 1749-50, 1771, 1774, 1781; as to sanitary facilities for employees in factories, shops, offices, etc., see §§ 1822-7; as to commission on medical education, see Acts 1920, p. 388; as to health, nursing, and physical education of school children, see Acts 1920, p. 495; as to venereal disease, see Acts 1918, p. 561, and Acts 1920, p. 548; as to dispensary facilities for the rural district by promoting the tuberculosis educational division of the State Board of Health, see Acts 1922, p.—; as to acceptance of provisions of act of Congress (Nov. 23, 1921) "for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," see Acts 1922, p.—.

HOMESTEAD AND OTHER EXEMPTIONS

§ 1. Homestead exemption

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- (4) How exemption secured and in what estate
- (5) How widow and minor children may have it done
- (6) How excessive homesteads guarded
- (7) How homestead sold and conveyed or exchanged
- (8) How homestead held after householder's death
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- (10) Exemptions allowed to bankrupts
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 - (c) City, town, and county officials, clerks, and employees
- § 5. Form of "homestead exemption"

§ 1. Homestead exemption.—(1) *The Statute.*—By section 6531, as amended by Acts 1918, p. 487: "Every householder or head of a family residing in this State shall be entitled, in addition to the property or estate which he is entitled to hold exempt from levy, distress, or garnishment under section 3650-2 (§§ 6552, 6563, and 6565, Code 1919), to

hold exempt from levy, seizure, garnishment, or sale under any execution, order, or process issued on any demand for a debt or liability on contract, hereafter contracted, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding \$2,000; provided, that such exemption shall not extend to any execution order or other process issued on any demand in the following cases:

(1) For the purchase price of said property or any part thereof. If the property purchased and not paid for be exchanged for or converted into other property by the debtor, such last named property shall not be exempted from the payment of such unpaid purchase money under the provisions of this section.

(2) For services rendering by a laboring person or mechanic.

(3) For liabilities incurred by any public officer or officer of a court, or any fiduciary, or any attorney at law for money collected.

(4) For a lawful claim for any taxes, levies or assessments accruing after the first day of June, 1866.

(5) For rent.

(6) For the legal or taxable fees of any public officer or officer of a court.

(7) Said exemption shall not be claimed or held in a shifting stock of merchandise (and such stock shall be considered shifting after an assignment by the owner thereof for the benefit of creditors and after a voluntary or involuntary adjudication in bankruptcy), or in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration.

But this act shall not invalidate any homestead exemption heretofore claimed under the provisions of the former Constitution, or impair in any manner the right of any householder or head of a family existing at the time that the present Constitution went into effect, to select the exemption, or any part hereof, to which he was entitled under the former Constitution; provided, that such right, if hereafter exercised, be not in conflict with the exemption set forth in sections 190 and 191 of the present Constitution.

But no person who has selected and received the full

exemption allowed by the former Constitution shall be entitled to select an additional exemption under the present Constitution; and no person who has selected and received part of the exemption allowed by the former Constitution shall be entitled to select an additional exemption beyond the difference between the value of such part and a total valuation of \$2,000." (See, also, Va. Const., §§ 190-1, of the same import.)

(2) *Who may claim homestead exemption; residence.*—Every "householder" or "head of a family" (these terms meaning the same thing), residing in this State, may claim the exemption. The exemption is designed for the benefit of the family, to secure the members thereof against want, rather than for the householder himself, and so is not available to one having no family dependent on him, nor in his house anyone but servants. The family need not, indeed, consist of wife or children; but it suffices if it be composed of persons (at least one other) whom he is under a moral obligation to support. A mere aggregation, however, of individuals, as a fraternity, is not sufficient; the aggregation must be a family with a master or chief, who may be a man or a woman (though having a husband living with her, under particular circumstances), married or single.

The householder must be a resident of this State—must have his domicile here; if he changes his domicile he forfeits the privilege of exemption, though mere absences, however long, of itself will not do so—see *Domicile*.

One does not lose his exemption by ceasing temporarily to keep house, as, during the period of removing from one house to another, or even by storing his furniture and boarding. So long as the members of the household remain together as a family, without being broken up and incorporated into other families, so long the exemption continues. Indeed, the exemption is not lost by the householder's family ceasing to exist—see (18), below. (4 Min. Inst. 106-7; Burks' Pl. & Pr., §§ 402, 414.)

(3) *When exemption may be set apart.*—It may be set apart "at any time before the same is subjected by sale or otherwise under judgment, decree, order, execution, or other legal process". (Code, § 6543, see 124 Va. 663.) But it cannot be asserted as a mere claim for the first time in the Court

of Appeals, after abundant opportunity to claim has been given in the trial court. (79 Va. 19, 25, 26).

(4) *How exemption secured and in what estate.*—The exemption may be in real or personal property, or both, or in legal or equitable estates, and is secured by a deed duly recorded where the realty is, or where the householder resides, in the case of personalty, declaring his intention to claim such exemption, describing the property with reasonable certainty, and giving the cash valuation of each tract or article. And additional exemptions may be filed until the limit (\$2,000) is reached. (Code, §§ 6531-2, 6539-40, 6547.) But when once set apart in full, while it may be exchanged for another (§§ 6535, 6546), yet if he has squandered one, he cannot secure another (76 Va. 222).

If partition or sale is necessary to ascertain the homestead, or make it available, it may be done. (Code, § 6534.) See *Partition*.

Real estate subject to encumbrances may be set apart as exempt; if sold to satisfy the same, the surplus is to be paid to the householder and invested by him in such other property as he may select. (Code, § 6533.)

(5) *How widow and minor children may have it done.*—“If the householder dies without having set apart the exemption, his widow and minor children may file a petition in court to have commissioners appointed to set it apart, if it is in real estate, but if in personalty, his widow may select and set it apart by deed as above; but if she die or marry, the minor children by their guardian or next friend may have it done by such a deed. If the widow receives dower or jointure (see *Dower and Jointure*), the value thereof is deducted from the exemption she here claims, but this shall not impair the rights of the minor children. (Code, §§ 6537, 6541.) See, also, (8), below.

Minors, upon their father's death, become entitled to claim a homestead in his estate, which cannot be divested by any act of theirs, and is not lost by their removal by their mother and guardian from the State (116 Va. 624).

(6) *How excessive homesteads guarded.*—See Code. § 6545.

(7) *How homestead sold and conveyed or exchanged.*—It may be sold and conveyed and the proceeds invested in

other property as a homestead, or it may in like manner be exchanged for other property, but in no case is the purchaser bound to see to the application of the purchase money. (Code, §§ 6535, 6546.)

(8) *How homestead held after householder's death.*—Real estate set apart as a homestead, after his death, is held by his widow and minor children exempt as before and also from the debts and obligations of such widow and children, until her death or marriage, and, thereafter, by such minor children until they respectively attain 21, or else marry before. (Code, § 6536.) See, also, (5), above.

(9) *Fraudulent exemptions.*—A homestead deed executed as a part and in furtherance of a design to defraud creditors, is thereby invalidated (33 Grat. 153). For the facts of this case, see opinion or 3 Hurst's Va. Dig., pp. 757-8. See, also, (7) of section 1, above.

(10) *Exemptions allowed to bankrupts.*—See *Bankruptcy*, section 13.

(11) *Lien before becoming a householder.*—A lien acquired by judgment, execution, or in any other manner than by the voluntary act of the debtor himself gives away to his claim to homestead exemption, even though the lien attaches before he became a householder (99 Va. 588, overruling 83 Va. 704).

(12) *Exemptions in partnership property.*—It would seem an exemption may be claimed in partnership property. (See note to § 6531 of Code.)

(13) *Effect of will of householder.*—From (5) and (8), above, permitting the widow and minor children to set apart a homestead, it is seen that the householder, if indebted, cannot make a will depriving them of this privilege. If he, being indebted, has set apart a homestead in his life-time, he cannot by will deprive his widow and minor children of the benefit thereof, for it is expressly otherwise provided—see (8), above. (Burks' Pl. & Pr., § 408.)

(14) *Double exemptions.*—Though a householder may hold two or more exemptions if they do not aggregate over \$2,000, it is doubtful if a widow while enjoying a homestead set apart by her husband can also claim a homestead in her property. (Burks' Pl. & Pr., § 408.)

(15) *Increase and improvements of homestead.*—The

homestead, if not exceeding \$2,000 when set apart, is not affected by any increase afterwards, except permanent improvements upon real estate from means derived from another source (Code, § 6544); and crops raised thereon, while they remain such are likewise exempt from levy and sale (111 Va. 707). How about the increase of personal estate, as, calves colts, lambs, etc.?

(16) *Under what circumstances homestead cannot be claimed.*—For the different cases enumerated in the statute, see section 1, above, as to which, we make the following observations: (a) As to the “purchase price,” where goods paid and unpaid for are intermingled, the burden is on the debtor to identify and show what have been paid for (33 Grat. 158; 103 Fed. 68; 108 Va. 197; 6 Va. Law Reg. 301). (b) As to “services rendered by a laboring person or mechanic”, a “laboring man,” by statute (§ 6566), includes “all householders who receive wages for their services.” Before this statute a mail carrier was held to be a laboring person (90 Va. 936). (c) As to “liabilities incurred by a public officer”, etc., this embraces a collector of taxes and his sureties (29 Grat. 683). (d) As to “shifting stock of merchandise”, it ceases to be such upon the death of the householder or his bankruptcy (116 Va. 624; 103 Fed. 68). (e) As to “fines”, “costs”, or “torts” (or wrongs), the exemption cannot be claimed against them, for neither is a “demand contracted”; not even against a claim for a breach of promise to marry, the court looking to the substance of the transaction and not to the form of action. (4 Min. Inst. 1004; Burks’ Pl. & Pr., § 405; 107 Va. 802.) (f) As against “heirs”, the widow cannot claim a homestead but only as against the husband’s creditors, i. e., where he leaves debts or liabilities on contract; and where there are no minor children, she cannot claim the exemption against the adult children. And where a husband sets apart a homestead in his lifetime and dies, owing debts, and leaving a widow but no minor children, the widow can continue to hold the homestead during her life or widowhood, and cannot be deprived thereof by the payment of his debts by his adult heirs; and perhaps the same would be true even if the homestead was claimed by the widow after the debts were paid. (Burks’ Pl. & Pr., § 405; 101 Va. 230.)

(17) *Waiver of exemption.*—The statute (§ 6548) pro-

vides that the homestead may be waived in any instrument, whether the property has already been set apart or not, in the following or equivalent words: "I (or we) waive the benefit of my (or our) exemption as to this obligation." The waiver is also by a deed of trust or mortgage or other conveyance—see (7), above.

And by section 6551, judgments or decrees, should say "upon an instrument waiving the homestead", or "upon a claim against which the homestead cannot be demanded," according to the fact, and the same should be endorsed on the execution; but silence in this respect raises no presumption of non-waiver, etc.; though otherwise, if the fact is not apparent from the face of the pleadings or the declaration. (Should not the reference in this section be not to the "preceding section", but to section 6548?)

The waiver in the body of a non-negotiable note does not waive as against the implied obligation of the assignor to the assignee, though the note says "the drawers and endorsers each hereby waive," etc. (93 Va. 584).

Waiver creditors cannot subject exempted property in a bankruptcy court, but must resort to the State court (117 Va. 642; 190 U. S. 294).

It is not certain that a partner may waive the exemption for each member of the firm. (Burks' Pl. & Pr., § 406.)

(18) *How claims enforced in case of exemptions.*—Other estate in the county or city must be first exhausted, and "if a debtor die leaving unsecured debts which stand on the same footing, but as to some of which the homestead is waived and as to others not, his property not embraced in the homestead shall be first applied ratably to all debts of the same class, and if it be not sufficient to pay them all in full, then the creditors holding a waiver of the homestead exemption may resort to the property set apart as a homestead for the payment of the balance of their debts."

One holding a first lien with no waiver may be paid ahead of other lien holders who have waivers or whose claims are not subject to exemptions, but whose claims exceed the whole value of the land (93 Va. 695).

(19) *Homestead may be claimed in amount due by garnishee in attachment.*—The amount found due by a garnishee in attachment, or the personal property in his posses-

sion, may be claimed by the defendant, if a householder, as exempt from such garnishment. (Code, § 6398).

(20) *Cessation of homestead.*—When the party ceases to be a householder or removes from the State (see *Domicile and Residence*), his homestead exemption ceases; and upon his death leaving neither wife nor minor children, or upon her death or marriage, or upon the youngest minor attaining 21 or all marrying before, the exemption shall cease; and the property passes as other estate according to the law of descents and distributions, or as may be willed or bequeathed by him, subject to his debts; but the lien of a judgment or decree, upon a demand not superior to the homestead, attaches in the order of their priority, respectively, to such only of his real estate as he may be possessed of or entitled to at the time the exemption ceases. (Code, § 6550.) The householder is thus left at liberty, while the exemption continues, to convey the exempted real estate free from all such liens, making the purchaser a good title. (Burks' Pl. & Pr., § 414.)

Notwithstanding this statute, under the Constitution (§ 192) the homestead does not cease, though the householder afterwards ceases to be such, as, by the death of the other members of the family, or otherwise (87 Va. 513).

(21) *Limitation runs during life of exemption.*—There is no deduction from the period of limitation on the enforcement of a judgment. The statute fixing such limitation contains no such exception (104 Va. 700).

(22) *Injunction to restrain sale of exempted property.*—An injunction lies to restrain the sale of any property exempt under this chapter or title, and to prevent the wages of a laboring man (see section 3, below) being garnisheed, or otherwise collected by an execution-creditor (Code, § 6565).

§ 2. Poor debtor's exemption.—(1) *The statute.*—By section 6552 of the Code: "In addition to the estate, not exceeding in value \$2,000, which every householder residing in this State shall be entitled to hold exempt, as provided in the preceding sections of this chapter (the "homestead" exemptions), he shall also be entitled to hold exempt from levy or distress the following articles, or so much or so many thereof as he may have, to be selected by him or his agents, except that the live stock so exempted under this and the following sections of this chapter shall not be exempt from any levy or

distress made under the provisions of chapter 137 of this Code (as to 'enclosures and trespass'):

- (1) The family Bible.
- (2) Family pictures, school books, and library for the use of the family, not exceeding \$100 in value.
- (3) A seat or pew in any house or place of public worship.
- (4) A lot in a burial ground.
- (5) All necessary wearing apparel of the debtor and his family; all beds, bedsteads, and bedding necessary for the use of such family; and all stoves and appendages put up and kept for the necessary use of the family, not exceeding three.
- (6) One cow and her calf till one year old, one horse, six chairs, six plates, one table, six knives, six forks, one dozen spoons, two dishes, two basins, one pot, one oven, six pieces of wooden or earthenware, one loom and its appurtenances, one safe or press, one spinning wheel, one pair of cards, one axe, two hoes; fifty bushels of shelled corn, or, in lieu thereof twenty-five bushels of rye or buckwheat; five bushels of wheat, or one barrel of flour; twenty bushels of potatoes, two hundred pounds of bacon or pork, three hogs, fowls not exceeding in value \$10, \$10 in value of forage or hay, one cooking stove and utensils for cooking therewith, one sewing machine, and in the case of a mechanic the tools and utensils of his trade, not exceeding \$100 in value, and in case of an oysterman or fisherman, his boat and tackle, not exceeding \$200 in value; if the boat and tackle exceed \$200 in value the same shall be sold, and out of the proceeds the oysterman or fisherman shall first receive \$200 in lieu of such boat and tackle." And where the householder is engaged in farming, section 6553 provides additional articles, as follows: "If the householder be at the time actually engaged in the business of agriculture, there shall also be exempt from such levy or distress, while he is so engaged, to be selected by him or his agent, the following articles, or so many thereof as he may have, to-wit: one yoke of oxen, or a pair of horses or mules in lieu thereof (unless he selects or has selected a horse or mule under the preceding section, in which case he shall be entitled to select under this section only one), with the necessary gearing, one wagon or cart, two plows, one drag, one harvest cradle, one pitchfork, one rake, and two iron wedges."

(2) *Need not be set apart in writing.*—This exemption need not be set apart in writing, but they are only to be selected by the householder or his agent, when occasion may arise, out of such goods as he may then have. The right to the exemption is never diminished by consumption, death of an exempted animal, or otherwise.

(3) *Who is a "householder"; residence.*—See section 1, (2), above.

(4) *Exemption not applicable to taxes, levies, purchase price, or trespass by animals.*—Neither the poor debtor's exemption, nor that of a "laboring man" (see section 3, below), nor that of widow, minor children, or unmarried daughters (see section 4, (2) below), extends to distress for taxes or levies, nor to levy or distress for the purchase price of the article, or for fines and damages or either arising from trespass by animals under section 3541 of the Code, as to such animals so trespassing—see *Animals, Fowls, etc.* (Code, § 6563.)

(5) *Deed of trust or other lien given on poor debtor's exemption under § 6552 is void.*—Every deed of trust, mortgage, or other writing, or pledge made by a householder to give a lien on property exempt from distress or levy under section 6552 (see (1), above) shall be void as to such property". (Code, § 6564.) Observe this does not apply to § 6553 (see (1), above).

(6) *No waiver of poor debtor's or laboring man's exemption.*—The statute as to the waiver of homestead exemptions, expressly excepts sections 6552-3 ("poor debtor's exemption"), and section 6555 ("laboring man's exemption"). If the householder fails to claim his exemptions, and permits his property to be sold under an execution, he would probably not be allowed to claim the property as against a *bona fide* purchaser; but otherwise if a poor debtor's property, embraced in section 6552 (see (1), above) be sold under a deed of trust, etc., (see (5), above), such lien being expressly declared to be void. (Burks' Pl. & Pr., § 415.)

(7) *Injunction to stop sale of exempt property.*—See section 1, (22), above.

(8) *On householder's death exemption in § 6552 vests absolutely in widow, minor children, and unmarried daughters.*—See section 4, (2), below.

§ 3. Laboring man's exemption.—(1) The *statute*.—"Wages owing to a laboring man being a householder, not exceeding \$50 per month, shall also be exempt from *distress*, levy or garnishment." (Code, § 6555.)

(2) *Who is "laboring man."*—The term includes "all householders who receive wages for their services" (Code, § 6566), and embraces a mail carrier (90 Va. 936).

(3) *How wages declared exempt.*—By section 6556, inserted by the Revisors of Code 1919: "If summons in garnishment to enforce an execution issued on a judgment obtained against a laboring man who is a householder, be served on any employer of such householder, the execution debtor may, after five days' written notice to the execution creditor and to the employer, apply to the justice issuing such execution, or to the court, or judge thereof in vacation, from whose clerk's office such execution issued, as the case may be, to have so much of the wages of said execution debtor as does not exceed fifty dollars per month declared to be exempt from the execution. Such application shall be informally heard forthwith, and if it shall appear that the wages, or any part thereof, are exempt, such court, judge, or justice shall declare that the amount of wages so found to be exempt is not subject to the execution. The remedy given in this section shall be available to the execution debtor if no summons in garnishment be served, but notice of the outstanding execution is otherwise received by the employer."

(4) *Protection against garnishment out of Virginia.*—The wages of a laboring man are protected against assignment of claims against him and garnisheeing thereon or attaching his effects out of the State, under a penalty of a fine of \$10 to \$100, and re-payment to the debtor of the full amount he has been garnished or attached, with interest and costs. (Code, § 6557.)

(5) *Injunction to stop garnishment of wages.*—See section 1, (22), above.

§ 4. Other exemptions.—(1) *Necessary food for family upon one's death.*—By section 6554 of the Code: "The dead victuals (or as much thereof as may be necessary) which, at the death of any person, shall have been laid in for consumption in his family, shall remain for the use of such family,

and lodged for pay. (Code, § 1585; Acts 1919, p. 152 or Pollard's Code Biennial 1920, p. 343, § 92½.)

§ 2. Obligation of hotel-keepers to take guests.—An inn-keeper is bound by the common law to take in all travelers and wayfarers, and to entertain them for a reasonable compensation, if he has room, unless they be disorderly, or come with some evil intent; and for refusal without sufficient reason, not only an action but an indictment lies. (3 Min. Inst. 290.)

§ 3. General statutory requirements as to hotels.—Charges are to be posted, fire escapes and extinguishers and escape from inside court or light—well provided—Code, §§ 1586-8, as amended by Acts 1922; hotels are to be inspected by state authority, and are required to comply with certain inspection and sanitary laws §§ 1589-1601 and Acts 1922, amending §§ 1589-90, 1592-3, 1595, and repealing § 1591. Signs posted as to oleomargarine, process or renovated butter, sold or served—§§ 1199; and warnings and directions as to use of gas posted—§ 1607.

§ 4. Duties of hotel keepers; liability.—(1) *General duties, and limit of liability.*—By section 1602 of the Code, they are bound to “due care and diligence in providing honest servants and employees, and to take every reasonable precaution to protect the person and property of their guests and boarders,” but no hotel-keeper “shall be held liable in a greater sum than \$300, for the loss of any wearing apparel, baggage or other property not hereinafter mentioned, belonging either to a guest or boarder, when such loss takes place from the room or rooms occupied by said guest or boarder, and no keeper of a hotel, inn or ordinary shall be held liable for any loss by any guest or boarder of jewelry, money or other valuables of like nature belonging to any guest or boarder if such keeper shall have posted in the room or rooms occupied by guests or boarders in a conspicuous place, and in the office of such hotel, inn or ordinary a notice stating that jewelry, money and other valuables of like nature must be deposited in the office of such hotel, inn or ordinary unless such loss shall take place from such office after such deposit is made.” The hotel-keeper “shall not be obliged to receive from any one guest for deposit in such office, any property hereinbefore described, exceeding a total value of \$500.”

(2) *Liability where guest fails to lock or bolt door, etc.*

—But by section 1603 such hotel-keeper is not liable where the guest fails to lock or bolt the doors, or to fasten the transoms, for any loss (other than through servants), where suitable locks, bolts, etc., have been provided, and notice to lock, etc., has been conspicuously posted in the rooms.

(3) *Liability in case of fire or overwhelming disaster.*—

By section 1604, in the case of loss by fire or overwhelming disaster, the hotel-keeper is answerable to his guests “for ordinary and reasonable care in the custody of their baggage or other property”, but no single liability is to exceed \$250, unless it clearly appears the fire or disaster was caused by his or her servant’s act, negligence or default.

(4) *Liability for baggage, hats, umbrellas, etc., not in actual custody of proprietor or employee.*—By section 1605, no liability attaches to a hotel-keeper for the baggage, hats, umbrellas, coats, or other wearing apparel of a guest until the same is placed in the actual custody of the proprietor or an employee of the hotel; and the mere depositing the same inside the hotel is not sufficient until taken in charge or the same is properly placed in the guest’s room.

(5) *Limitation to suits.*—Action or suit must be brought within one year (Code, § 1606).

§ 5. “Beating” board bills, and punishment.—By section 4464 of the Code: “Whoever puts up at a hotel or boarding-house and without having an express agreement for credit procures food, entertainment, or accommodation without paying therefor and with intent to cheat or defraud the owner or keeper of such hotel or boarding-house out of the pay for the same; or with intent to cheat or defraud such owner or keeper out of the pay therefor obtains credit at a hotel or boarding-house for such food, entertainment, or accommodation by means of any false show of baggage or effects brought thereto; or with such intent obtains credit at a hotel or boarding-house for such food, entertainment, or accommodation through any misrepresentation or false statement; or with such intent removes or causes to be removed any baggage or effects from a hotel or boarding-house, while there is a lien existing thereon for the proper charges due from him for fare and board furnished therein, shall be punished by im-

prisonment not exceeding three months or by fine not exceeding \$50."

§ 6. *Lien of hotel-keepers, etc., and enforcement of same.*—See *Liens of Mechanics and Others*, sections 20 and 23.

§ 7. *License tax of hotel-keeper.*—A hotel-keeper (see section 1, above) must pay an annual license tax of \$2 for each bedroom and \$1 for each bathroom; but hotels at summer and health resorts, keeping open not over 4 months in the year, pay only one-half the above amounts (Acts 1919, p. 152; Pollard's Code Biennial 1920, p. 343, § 92½).

HOUSE-BREAKING, ETC.

See Burglary

§ 1. The statutes

- (1) Entering dwelling-house or other house, vessel, or car in the night or, etc., with intent to commit murder, rape, or robbery; how punished
- (2) Same act, with intent to commit larceny; how punished

§ 2. Remarks upon the above statutes

§ 3. House-breaking and larceny may be joined

§ 4. Form of "description" in warrant or indictment

§ 1. The statutes.—

(1) *Entering dwelling-house or other house, vessel, or car in the night or, etc., with intent to commit murder, rape, or robbery; how punished.*—"If any person in the night enter without breaking or in the day-time break and enter a dwelling-house or an out-house adjoining thereto and occupied therewith or in the night-time enter without breaking or break and enter either in the day-time or night-time any office, shop, store-house, warehouse, banking-house, or other house, or any ship or vessel or river craft or any railroad car with intent to commit murder, rape, or robbery, he shall be confined in the penitentiary not less than 3 nor more than 15 years." (Code, § 4438.)

(2) *Same act, with intent to commit larceny; how punished; robbing bank, how punished.*—"If any person do any

of the acts mentioned in the preceding section, with intent to commit larceny, or any felony other than murder, rape, or robbery, he shall be confined in the penitentiary not less than one nor more than ten years, or, in the discretion of the jury, confined in jail not exceeding 12 months, and fined not exceeding \$500. If any person, armed with a deadly weapon, shall enter any banking house in the day-time or in the night-time with intent to commit larceny of money, bonds, notes, or other evidence of debt therein, he shall be punished with death, or, in the discretion of the jury, by confinement in the penitentiary not less than 5 nor more than 18 years." (Code, § 4439, as amended by Acts 1922.)

§ 2. Remarks upon the above statutes.—This statute is designed, very prudently, to supplement the common law in that comparatively numerous class of cases where the act does not amount to burglary, yet is committed in reference to a dwelling or other house, &c. Thus, in burglary there must be a breaking as well as an entering into a dwelling-house, in the night-time with intent to commit a felony or larceny therein; and should any one of these constituents be lacking, burglary fails, for all must concur to make this offense. Burglary, therefore, embraces none of the following cases provided for by the foregoing statutes :

(1) *As to dwelling-houses*—(1) The entering, without breaking, a dwelling-house, or an out-house adjoining thereto and occupied therewith," in the night-time, with intent to commit felony or larceny; (2) the breaking and entering such house in the day-time, with the like intent.

(2) *As to other houses, etc.*—(1) The entering, without breaking, "any office, shop, storehouse, warehouse, banking-house, or other house, or any ship, or vessel, or river craft, or any railroad car" in the night-time, with intent to commit felony or larceny therein; (2) The breaking and entering any of them at any time, whether night or day, with the like intent (H's G. & M., p. 173).

As to breaking and entering, night-time, intent, and ownership of the house, the law is the same as in case of burglary. See *Burglary*.

Exclusive possession of goods recently stolen is not *prima facie* evidence of house-breaking (98 Va. 749). See, also, *Burglary*.

§ 3. House-breaking and larceny may be joined.—As in the analogous case of burglary, larceny may be and usually is, joined to house-breaking, &c., and if the actual larceny be properly stated, there may be an acquittal of one and conviction of the other. There may also be a conviction of house-breaking under an indictment for burglary. (H's G. & M., p. 174.)

§ 4. Form of "description" in warrant or indictment.—

No. 1. ENTERING, WITHOUT BREAKING, IN THE NIGHT, A DWELLING-HOUSE, WITH INTENT TO COMMIT MURDER, RAPE, ROBBERY, OR ANY OTHER FELONY.

(Code, § 4438.)

DESCRIPTION:

"feloniously did enter without breaking, in the night-time of that day, the dwelling-house of the said A. B., with intent in the said dwelling-house, then and there feloniously to kill and murder the said A. B."

If the intent be to commit rape, instead of saying "to kill and murder the said A. B.," say "to ravish and carnally know her, the said A. B., by force and against her will"; if it be robbery, say "to rob the said A. B."; or, if it be abduction, malicious maiming, or some other felony, describe it with legal accuracy.

The above form will suffice even though the felony be actually committed; but in that event, if the felony be a capital one, it were better to proceed for such felony itself.

No. 2. BREAKING AND ENTERING, IN THE DAY-TIME, A DWELLING-HOUSE, WITH INTENT TO COMMIT MURDER, RAPE, ROBBERY, OR ANY OTHER FELONY.

(*Idem.*)

DESCRIPTION:

"feloniously did break and enter, in the day-time of that day, the dwelling-house of the said A. B., with intent, in the said dwelling-house, then and there feloniously to kill and murder the said A. B."

As to other felonies, see the two notes under the next preceding form, which notes are equally applicable to this form.

No. 3. ENTERING, WITHOUT BREAKING, IN THE NIGHT, A DWELLING-HOUSE, WITH INTENT TO COMMIT LARCENY; OR, BREAKING AND ENTERING THE SAME, IN THE DAY-TIME, WITH THE LIKE INTENT.

(*Idem*; § 4439.)

DESCRIPTION:

"feloniously did enter, without breaking, in the night-time (or,

feloniously did break and enter in the day-time) of that **day**, the dwelling-house of the said A. B., with intent the goods and **chattels** of the said A. B., in the said dwelling-house, then and there **feloniously** to steal, take, and carry away [and one coat of the **value** of ——— dollars, of the goods and chattels of the said A. B., **in the** said dwelling-house then being, feloniously did steal, take, and **carry away**]."

If the larceny be actually committed, supply the words **in the** brackets, so that if the proof should fail to sustain the **graver** offense, there may be a conviction for the larceny.

NO. 4. ENTERING, WITHOUT BREAKING, IN THE NIGHT, AN outhouse ADJOINING TO AND OCCUPIED WITH A DWELLING-HOUSE WITH INTENT TO COMMIT LARCENY; OR BREAKING AND ENTERING SUCH outhouse IN THE DAY-TIME WITH THE LIKE INTENT.

(*Idem.*)

DESCRIPTION:

"feloniously did enter without breaking, in the night-time (or, *feloniously did break and enter in the day-time*) of that day, a certain outhouse, the property of the said A. B., adjoining to and occupied with the dwelling-house of the said A. B., with intent the goods and chattels of the said A. B., in the said outhouse, then and there feloniously to steal, take, and carry away, and two bushels of wheat, of the value of ——— dollars, of the goods and chattels of the said A. B., in the said outhouse then being, feloniously did steal, take, and carry away."

Larceny is joined in this form, and a conviction may be had for either offence.

NO. 5. ENTERING, WITHOUT BREAKING, IN THE NIGHT-TIME, AN OFFICE, A SHOP, STOREHOUSE, WAREHOUSE, BANKING-HOUSE, OR OTHER HOUSE, NOT ADJOINING TO OR OCCUPIED WITH A DWELLING-HOUSE, WITH INTENT TO STEAL, AND STEALING THEREFROM.

(*Idem.*)

DESCRIPTION:

"feloniously did enter without breaking, in the night-time of that day a certain office (or shop, storehouse, warehouse, banking-house or other house), the property of the said A. B., and not adjoining to or occupied with the dwelling-house of the said A. B., with intent to commit larceny therein, and one pair of shoes of the value of ——— dollars, of the goods and chattels of the said A. B., in the said office then being, feloniously did steal, take, and carry away."

NO. 6. BREAKING AND ENTERING, AT ANY TIME, AN OFFICE, SHOP, STOREHOUSE, WAREHOUSE, BANKING-HOUSE, OR OTHER HOUSE, NOT ADJOINING TO OR OCCUPIED WITH A DWELLING-HOUSE, WITH INTENT TO STEAL, AND STEALING THEREFROM.

(*Idem.*)

DESCRIPTION:

"feloniously did break and enter a certain office (or shop, storehouse, warehouse, banking-house, or other house), the property of the said A. B., and not adjoining to or occupied with the dwelling-house of the said A. B., with intent to commit larceny therein, and one gold watch of the value of ——— dollars, of the goods and chattels of the said A. B., in the said office then being, feloniously did steal, take, and carry away."

NO. 7. ENTERING, WITHOUT BREAKING, IN THE NIGHT, OR BREAKING AND ENTERING, AT ANY TIME, A MEETING-HOUSE WITH INTENT TO STEAL, AND STEALING THEREFROM.

DESCRIPTION:

"feloniously did break and enter (or, *feloniously did enter, without breaking, in the night-time of that day*), a certain meeting-house dedicated for the public worship of God, and called ———, with intent to commit larceny therein, and one Bible, of the value of ——— dollars, of the goods and chattels of the said A. B., in the said meeting-house then being, feloniously did steal, take, and carry away."

NO. 8. ENTERING, WITHOUT BREAKING, IN THE NIGHT OR BREAKING AND ENTERING, AT ANY TIME, A RAILROAD CAR, SHIP OR VESSEL, OR RIVER CRAFT, WITH INTENT TO COMMIT MURDER, RAPE, ROBBERY, OR OTHER FELONY.

DESCRIPTION:

"feloniously did break and enter (or, *feloniously did enter, without breaking, in the night-time of that day*) a certain railroad car (or ship or vessel, or river craft) called ——— railroad car, being within the jurisdiction of the said county, with intent then and there to commit murder (or rape, robbery, or some other felony, designating it with legal accuracy).

NO. 9. ENTERING, WITHOUT BREAKING, IN THE NIGHT, OR BREAKING AND ENTERING AT ANY TIME, A RAILROAD CAR, SHIP OR VESSEL, OR RIVER CRAFT, WITH INTENT TO STEAL, AND STEALING THEREFROM.

(*Idem.*)

DESCRIPTION:

"feloniously did break and enter (or, feloniously did enter, without

breaking, in the night-time of that day) a certain railroad car (or ship vessel, or river craft), called _____ railroad car, ~~being~~ within the jurisdiction of the said county, with intent, in the said railroad car, then and there to commit larceny, and one keg of nails, of the value of _____ dollars, of the goods and chattels of the _____ railroad company, in the said railroad car then being feloniously ~~and~~ steal, take, and carry away."

In this as in all the forgoing forms, the goods stolen ~~may~~ be laid as the property of any one having the actual or constructive possession of the goods, or a general or specific property therein.

HUNTING

See Trespass

- § 1. In general
- § 2. Local acts
- § 3. Game wardens
- § 4. Procedure for enforcing forfeitures, under fish, oyster, and game laws

§ 1. **In general.**—As the Commissioner of Game and Inland Fisheries is required to publish in pamphlet form, for general distribution, the laws relating to game, fish, and birds (Code, § 3317), which may be obtained upon application to him at Richmond, Va., we merely refer to the present statutes—see Code, §§ 3306-65, and Acts 1918, p. 438 amending §§ 3319-20, 3329, 3333) and Acts 1918, p. 236, amending § 3359; Acts 1918, p. 446 (authorizing the Department of Game and Inland Fisheries to license persons to breed game, game fish, and fur-bearing animals); Acts 1920, p. 255 (protection of elk); Acts 1920, p. 117 (protection of partridges, wild turkeys, and pheasants); Acts 1922, p. — (protection of wild water fowl).

§ 2. **Local acts.**—The laws creating the Eastern Shore of Virginia Game Protective Association, etc., for the protection of wild water fowls in Back bay and its tributaries, and the adjacent lands in Princess Anne county, are continued in force (Code, § 3347).

Indeed, all acts of local application (see *Statutes*), re-

lating to trespass, the protection of game, birds, water fowls, or fur-bearing animals, are continued in force (Code, § 3365). The Code (see § 6567) repeals only acts of a general nature—see 88 Va. 205. But by section 3346, all laws, general, special, or local, conflicting with chapter 130 as to the game or inland fish laws, or the Federal migratory bird laws, are repealed. See the various Acts under the different counties in the index to Acts of Assembly.

§ 3. Game wardens.—Besides regular and special game wardens, sheriffs, deputy sheriffs, marshals, constables, policemen, members of the Commission of Fisheries, oyster police captains, and oyster police inspectors, and other peace officers of the State, are ex-officio game wardens. (Code, §§ 3319-20, as amended by Acts 1918, p. 438; and §§ 3321-5.)

§ 4. Procedure for enforcing forfeitures, under fish, oyster, and game laws.—See Code, §§ 3366-77.

HYPNOTISM AND MESMERISM

Hypnotizing or mesmerizing or attempting to do so, by one not a licensed physician or surgeon and not at his request, is punishable by a fine not over \$500, or jail not over 12 months, or both. (Code, §§ 4721, 4782.)

IGNORANCE

It is a general maxim of the law that ignorance of the law excuses no one. Ignorance of a fact will, on the other hand, usually excuse a person, especially where, as in certain criminal cases, knowledge—"scienter"—is necessary to the offenses.

INDEMNIFYING BOND

See *Bonds*

- § 1. The statutes
- § 2. Bond good though not complying with statute
- § 3. Form of indemnifying bond

§.1. **The statutes.**—By section 6154 of the Code: "If any officer levies or is required to levy a *feri facias*, an attachment, or a warrant of distress on property, and a doubt shall arise whether the said property is liable to such levy, he may give the plaintiff, his agent or attorney at law, notice that an indemnifying bond is required in the case; bond may thereupon be given by any person, with good security, payable to the officer in a penalty equal to double the value of the property, with condition to indemnify him against all damage which he may sustain in consequence of the seizure or sale, of said property and to pay to any claimant of such property all damage which he may sustain in consequence of such seizure or sale, and also to warrant and defend to any purchaser of the property such estate or interest therein as is sold. If such indemnifying bond be not given within a reasonable time after such notice, the officer may refuse to levy on such property, or may restore it to the person from whose possession it was taken, as the case may be. If it be given the officer shall proceed to levy if he has not already done so, or if the levy has been released. Any indemnifying bond taken by an officer under this section shall be returned by him within twenty days to the clerk's office from which the *feri facias* or attachment issued, or if the *feri facias* or attachment was not issued by a clerk, to the office of the court to which the attachment is returnable, or if it be a *feri facias* or distress warrant, to the office of the court by which the officer who levied the *feri facias* or distress warrant was appointed, or in which he qualified." By section 6155: "The claimant or purchaser of such property shall after such bond is so returned, be barred of any action against the officer levying thereon, provided the security (surety) therein be good at the time of taking it." Suit on the bond may be in the name of the officer (though he be dead) for the benefit of the claimant, creditor, purchaser, or other person injured, and such damages recovered

as a jury may assess (Code, § 6156). Where the bond has been given by some of the execution-creditors only, the proceeds of the sale is paid to them in the order in which their liens attached (Code, § 6489).

An indemnifying bond may be required in case of a judgment on a lost bond, note, or other written evidence of debt (Code, § 6242); by a surety in a bond (other than of a commissioner or receiver) given under a decree or order of court, where he or the estate is likely to suffer pecuniary loss (Code, § 5776); by a surety in a bail-bond or a recognizance for the appearance of one charged with crime (Code, § 4836); or where suit is brought by an officer to recover property subject to a lien of a judgment or an execution (Code, § 6514).

§ 2. Bond good though not complying with statute.—Though not in conformity with the statute, the bond is yet good at common law. (4 Min. Inst. 1034.)

§ 3. Form of indemnifying bond.—[In case of execution, attachment, or distress, see No. 4, under *Bonds*; in case of interpleader, see No. 6, under *Interpleader*.]

INDIAN

An Indian is any one (not a “colored person”) having one-fourth or more of Indian blood (Code, § 67).

INJUNCTION

(See “Burks’ Pleading & Practice” (new ed.))

- § 1. Definition
- § 2. Cases where injunction lies
- § 3. Statutory regulations

§ 1. Definition.—An injunction is a restraining writ or order of a court or judge enjoining or forbidding the doing

of some specified act, in cases where there is no other adequate remedy at law, or where material and irreparable injury may otherwise be done.

§ 2. *Cases where injunction lies.*—The writ is used in a great variety of cases; as, in the case of illegal distress, nuisance, libel, wrongful taking of personal property, trespass on lands, waste, etc. It is used to stay proceedings at law; to restrain the setting up of an inequitable defense at law, the collection of illegal taxes, the infringement of a patent, copyright, label, or trade-mark, the removal of property out of the State, illegal acts of city or town officers, the conveyance of property pending a suit for specific performance, the cutting of timber on land in dispute, companies from doing illegal acts, the unlawful diversion of water or the pollution of a stream, the erection of a house across a public alley, acts of violence in case of strikes, etc. (Bouvier's Law Dict. *Injunction.*)

Injunctions are specially provided by statute, to enforce law relating to primary elections (§ 224); to restrain counterfeiting or imitating trade-marks (§ 1460); against house of prostitution (§§ 1522-8); by State Corporation Commission against public service corporation (§ 3902); in proceeding against a railroad company for violation of law relating to live stock (§ 4006); against insurance company, proceeding for liquidation (§ 4243); against a fraternal benefit society (§ 4298); against violation of law as to advertisement of intoxicating liquors (§ 4609); to abate a nuisance under the "Prohibition Law" (§ 4630); to prevent sale, pending suit in which defense of usury is made (§ 5555); to restrain the use of a name, portrait, or picture for advertising purposes (§ 5782); in suits for specific property (§ 6315); when bill of review is granted (§ 6316); against removing property out of State (§ 5323); in attachment proceedings (§ 6389); to restrain sale of crop subject to lien (§ 6453); against sale of exempt property or garnishment of exempt wages (§ 6565).

§ 3. *Statutory regulations.*—For chapter, see Code, §§ 6315-28, and Acts 1922, amending §§ 6317, 6322, and Acts 1922, repealing § 6326. For jurisdiction generally, see Code, §§ 5318-19, 6049-50; Richmond, §§ 5922, 5928; Norfolk, § 5935; Roanoke, § 5947.

The sheriff or sergeant to whom such person is committed must forthwith or the same day make application to the hospital or colony for his admission and transfer; upon receipt of the papers, the clerk must at once notify the commissioner of State hospitals (and the State Board of Charities and Corrections); and if the party is still in jail after 6 months, he must notify him of that fact. (Code, § 1022, as amended by Acts 1920, p. 376.)

If the superintendent of the hospital or colony fails to send for the party within 6 days after his confinement in jail, the Commissioner of State Hospitals must forthwith order the sheriff or sergeant at once to convey him to some other designated hospital or colony. (Code, § 1023.)

The sheriff or sergeant, or other person in charge, before delivering such person to a hospital or colony must see that he is clean, free from vermin or any contagious disease, and properly clothed. He must be delivered to nearest station or wharf to be designated by the superintendent, at the county's or city's expense, the distance to be not over 25 miles from the courthouse. (Code, § 1024, as amended by Acts 1920, p. 376.) If the officer fails to deliver him at the time and place designated, the superintendent may cause the party to be delivered to the hospital or colony, the expense to be paid by the county or city (Code, § 1025).

When the papers are in due form and there is room the party must be received promptly (Code, § 1026).

The superintendent, at the cost of the hospital or colony, (except in the case of criminals), sends an attendant for the party, or appoints some suitable person, or directs the officer, to convey him to the hospital or colony, transportation being furnished for the purpose, and actual expenses paid the one conveying him. (Code, § 1027, as amended by Acts 1920, p. 376.)

If upon examination at the hospital the party is found not insane, etc., he is returned, with a certificate of discharge; but if found insane, etc., the fact is reported in writing to the physicians who examined him, giving a full report of the case and suggestions as to treatment of such cases. (Code, § 1028, as amended by Acts 1922.)

For disposition of non-resident insane, etc., see Code, § 1030.

§ 4. **Testing legality of detention as insane, etc.**—This may be done by *habeas corpus* issued and tried by a court or judge. (Code, § 1029, as amended by Acts 1920, p. 240.)

§ 5. **Admission to hospital or colony without commitment proceedings.**—See Code, §§ 1031-6.

§ 6. **Delivery to friends.**—This may be done, where proper bond is given, except where the party is charged with crime (Code, § 1040).

§ 7. **Committee for insane, epileptic, feeble-minded, or idiot.**—

(1) *Appointment; extra comfort for inmates.*—The court appoints a committee for one adjudged insane, epileptic, feeble-minded, or idiot. The committee, when the rights of creditors will not be affected, and after making adequate provisions for dependents upon the party or his estate for support, may apply any part or the whole of the rest of the income for extra comforts and luxuries of the inmate. The steward of the hospital is to report to the committee annually such receipts and disbursements, the superintendent certifying that none of the expenditures were for ordinary or regular support. (Code, § 1050, as amended by Acts 1920, p. 376 and § 1053.)

Also where suspected to be insane, etc., the court upon application of one interested, may examine into his sanity or mentality and if found insane, may appoint one or two persons as committee for him. (Code, § 1051.)

In like manner a committee may be appointed for a non-resident having property here. (Code, § 1052.)

(2) *Bond; when sheriff or sergeant made committee.*—The court takes from the committee a sufficient bond; if a person is found insane under section 1050 the judge or court may do so; if bond be not given within 2 months, or if no person is appointed committee within one month after the adjudication, a party interested may have some one else appointed, who must give bond, or the court may commit the estate to the sheriff or sergeant, as committee, his official bond being bound. (Code, § 1053, as amended by Acts 1922.)

(3) *Powers and duties of committee.*—By section 1054 of the Code: "The committee mentioned in the preceding section shall be entitled to the custody and control of the per-

son of his ward (when he resides in the State, and is not confined in a hospital or serving a term of penal servitude), shall take possession of his estate, and may sue and be sued in respect to all claims or demands of every nature in favor of or against his ward, and any other of his ward's estate, and he shall have the same right of retaining for his own debt as an administrator would have. No action or suit on any such claim or demand shall be instituted by or against the ward of such committee after commitment and until he is discharged. All actions or suits to which he is a party at the time of his commitment shall be prosecuted or defended, as the case may be, by such committee, after ten days' notice of the pendency thereof, which notice shall be given by the clerk of the court in which the same are pending. He shall take care of and preserve such estate and manage it to the best advantage; shall apply the personal estate, or so much as may be necessary, to the payment of the debts of his ward, and the rents and profits of the residue of his estate, real and personal, and the residue of the personal estate, or so much as may be necessary, to the maintenance of such person and of his family, if any; and shall surrender the estate, or so much as he may be accountable for, to such person, if he shall be restored, or the real estate to his heirs or devisees, and the personal estate to his executors or administrators, in case of his death without having been restored, but nothing in this section shall be construed as affecting in any way the provisions of section 1050" (as to extra comforts or luxuries—see (1), above).

Where no committee, or he has removed, or has adverse interests to the lunatic, another may be appointed or suit may be in name of the lunatic by next friend (21 Grat. 712; 28 Grat. 365; 116 Va. 762), or if he is defendant a guardian *ad litem* may be appointed (Code, § 6098; 81 Va. 588).

One not appointed, but acting as a committee or trustee, is liable as such (78 Va. 387).

A committee has absolute control and management of the estate, and a court cannot under sections 5430 or 2309 of the Code order its investment, or payment on taxes (104 Va. 213).

The lunatic should be furnished not only with necessaries, but all the proper recreation and amusements consistent with

his former habit of living. His care, health, and comfort are alone to be considered, without reference to the next of kin, heirs at law, and expectants. It is not malfeasance to trench upon the *corpus* or body of the personal estate for the necessary maintenance of the lunatic and his family, without first obtaining permission of the court. (116 Va. 687).

A committee may sue for the preservation and protection of the right of maintenance of a lunatic, either entire or partial, in a trust fund (115 Va. 527). The compensation of a committee rests in the sound discretion of the court, under all the circumstances of the case (116 Va. 687).

For the duties of a committee as to accounting, etc., the law as to fiduciaries in general (Code, §§ 5401-40, and Acts 1920, p. 556, amending § 5431) apply to them—see *Administrators and Executors* and *Guardian and Ward*.

(4) *Sale or lease of real estate by committee.*—See Code §§ 1055-7; and §§ 5334-47 (as to “lands of persons under disability”); and 116 Va. 687. For forms, see under *Minors, Infants, etc.*

(5) *Transfer of property to another State.*—See Code, §§ 5348-56, and *Guardian and Ward*.

§ 8. Epileptics, inebriates, and feeble-minded, special provisions as to.—For who are, see Code, § 1066, as amended by Acts 1920, p. 376, and §§ 1068, 1075 (as amended by Acts 1922). For where committed, and other special provisions, see Code, §§ 1067-94, and Acts 1920, p. 376, amending §§ 1067, 1076, 1078-2, 1085, 1089, and Acts 1922, amending, §§ 1075, 1077; 123 Va. 205.

§ 9. Miscellaneous provisions.—For provisions as to hospitals, board of directors, superintendent, other resident officers, and Commissioner of State Hospitals, see Code, §§ 1004-16, 1037, 1059-60 1095, and Acts 1920, p. 376, amending §§ 1004-5; as to furloughs, re-examination, surrender of party, by surety to hospital, how arrested and confined, discharge, §§ 1041-6, and legal settlement while in hospital or colony, § 1047, as amended by Acts 1920, p. 376; as to resident officers of hospital or colony as conservators of the peace, mistreatment of inmates aiding escape, disorderly conduct on grounds, resisting officers, and giving ardent spirits or narcotics to inmates, see Code, §§ 1061-65; as to carnal con-

nection with or rape of inmates, § 4414, as amended by Acts 1918, p. 139. For law prohibiting improper and unlawful marriages of insane, epileptic, or feeble-minded persons, see Acts 1920, p. 231; Pollard's Code Biennial 1920, p. 723.

For uniform statute for the extradition or sending back to another state, persons of unsound mind, see Acts 1920, p. 511; Pollard's Code Biennial 1920, p. 766. For an act providing for a commission on mental health, see Acts 1922, p. _____.

II. CRIMINAL CASES AGAINST

§ 10. When committed to hospital or colony for observation, before trial.—By section 4909, as amended by Acts 1922, p. —: "If, prior to the time for trial of any person charged with crime, either the court or attorney for the Commonwealth has reason to believe that such person is in such mental condition that his confinement in a hospital for the insane or a colony for the feeble-minded is necessary for proper care and observation, the said court or the judge thereof may, after hearing evidence on the subject, commit such person to the department for the criminal insane at the proper hospital under such limitations as it may order, pending the determination of his mental condition, and in such case the court, in its discretion, may appoint one or more physicians skilled in the diagnosis of insanity, or other qualified physicians, and when any person is alleged to be feeble-minded may likewise appoint persons skilled in diagnosis of feeble-mindedness, not to exceed three, to examine the defendant before such commitment is ordered, and make such investigation of the case as they may deem necessary, and report to the court the condition of the defendant at the time of their examination. A copy of the complaint or indictment, attested by the clerk, together with the report of the examining commission, including, as far as possible, a personal history, according to the form prescribed by the general board of directors of the State hospitals, shall be delivered with such person to the superintendent of the hospital to which he shall have been committed under the provisions of this act."

If a court, in which a person is held for trial, see reasonable ground to doubt his sanity or mentality at the time at

which, but for such a doubt, he would be tried, it shall suspend the trial and proceed as prescribed in the foregoing.

§ 11. When trial of sanity or mentality ordered.—By section 4909, as amended by Acts 1922: "If a court, in which a person is held for trial, see reasonable ground to doubt his sanity or mentality at the time at which, but for such a doubt, he would be tried it shall suspend the trial and proceed as prescribed in the foregoing paragraph (section 10, above) or until a jury inquires into the fact as to the sanity or mentality of such person. Such jury shall be impaneled at its bar. If any such person so removed to the department for the criminal insane at the proper hospital is, in the opinion of the superintendent, not insane or feeble-minded, or when such person, if insane, has been restored to sanity, the superintendent shall give 10 days' notice in writing to the clerk of the court from which such person was committed, and shall send such person back to the jail or custody from which he was removed, where he shall be held in accordance with the terms of the process by which he was originally committed or confined."

§ 12. If found insane or feeble-minded, what court to do.—By section 4909, as amended by Acts 1922: "If the jury or commission find the accused to be sane at the time of their verdict, they shall make no other inquiry, and the trial in chief shall proceed. If the jury find that he is insane or feeble-minded at the time of their verdict, they shall further inquire whether or not he was insane or feeble-minded at the time of the alleged offense; if they find that he was also insane or feeble-minded at the time of the alleged offense the court may dismiss the prosecution and shall order him to be removed thence to the department of the criminal insane at the proper hospital, there to be detained until he is restored to sanity. If they find that he was not insane or feeble-minded at the time of the alleged offense, but is now insane or feeble-minded, the court shall order him to be confined in the department for criminal insane at the proper hospital until he is so restored that he can be put upon his trial.

"The experts or physicians skilled in the diagnosis of insanity or feeble-mindedness, or the physicians appointed by the court to render the foregoing professional service shall

be paid at the rate of fifteen dollars per diem, and mileage during attendance upon court in the trial of such cases. Itemized account of expense, duly sworn to, must be presented to the court, and when allowed, shall be certified to the auditor of public accounts for payment out of the State treasury, and be by him charged against the appropriation made to pay criminal charges. Allowance for the per diem authorized shall also be made by order of the court duly certified to the auditor of public accounts for payment out of the appropriation to pay criminal charges.

"The superintendent shall from time to time, or as often as the court may require, inform the court of the condition of the said person while confined in the hospital."

§ 13. Disposition of person becoming insane after conviction.—By section 4910 of the Code, as amended by Acts 1920, p. 507: "If, after conviction and before sentence of any person, the court see reasonable ground to doubt his sanity or mentality, it may impanel a jury or appoint a commission of insanity to inquire into the fact as to his sanity or mentality, and sentence him, or commit him to jail or to a hospital for the insane, according as the jury or commission may find him to be sane or insane or feeble-minded. If any person, after conviction of any crime, or while serving sentence in the State penitentiary, or any other penal institution, or in any reformatory or elsewhere, is declared by a jury or commission of insanity to be insane or feeble-minded, he shall be committed by the court to the department for the criminal insane at the proper hospital, and there kept until he is restored to sanity; and the time such person is confined in the department for the criminal insane at the proper hospital shall be deducted from the term for which he was sentenced to such penal institution, reformatory or elsewhere."

§ 14. Duties of sheriff or sergeant.—By section 4910, re-enacted by Acts 1920, page 507: "The sheriff or sergeant of the court by which any of the orders as provided for in this act and the preceding section, shall have been made, or the proper officer of the penitentiary or reformatory, shall immediately proceed in the manner directed by section one thousand and twenty-two to ascertain whether a vacancy exists in the department for the criminal insane at the proper

hospital, and until it is ascertained that there is a *vacancy*, such person shall be kept in the jail of such county or *corporation*, or in such custody as the court may order, *or in the* penitentiary, or in the reformatory in which he is *confined*, until there is room in the department for the criminal *insane* at the said hospital. Any person whose care and custody are herein provided for shall be taken to and from the hospital to which he was committed by an officer of the penal institution having custody of him, or by the sheriff or sergeant of the county or corporation whose court issued the order of commitment, and the expenses incurred in such removals shall be paid by such penal institutions, county or corporation."

§ 15. When taken from hospital and committed to jail.—By section 1045 of the Code, persons in the hospital restored to sanity are required to be discharged.

By section 4911 of the Code: "When the superintendent of the State Hospital for the Insane shall give notice to the clerk of the court, in pursuance of section 1045, such clerk shall issue a precept to the officer of said court, requiring him to bring the said prisoner from the hospital and commit him to jail."

§ 16. Sentence or trial, when restored.—By section 4912 of the Code, as amended by Acts 1920, p. 507: "When a prisoner is brought from a hospital and committed to jail, or when it is found by a verdict of another jury that a prisoner, whose trial or sentence was suspended by reason of his being found to be insane or feeble-minded, has been restored, if convicted, he shall be sentenced, and if not, the court shall proceed to try him as if no delay had occurred on account of his insanity or feeble-mindedness."

§ 17. Verdict of acquittal to state facts; commitment to hospital.—By section 4913 of the Code, as amended by Acts 1920, p. 507: "When the defense is insanity or feeble-mindedness of the defendant at the time the offense was committed, the jury shall be instructed, if they acquit him on that ground, to state the fact with their verdict. If the jury so find the court shall thereupon, if it deem his discharge dangerous to the public peace or safety, order him to be committed to one of the State hospitals for the insane and be confined there under special observation and custody until

the superintendent of that hospital and the superintendent of any other State hospital or feeble-minded colony shall pronounce him sane and safe to be at large."

INSIGNIA OR SOCIETY BUTTON.

Unlawfully using or wearing an insignia or button of any association, society, or trade's union, or a Southern cross of honor, is punishable by a fine not over \$500, or jail not over 12 months, or both. (Code, §§ 4719, 4782.)

INSURANCE AND INSURANCE COMPANIES

See Corporations; Taxation and Tax Bill

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§ 1. Bureau of insurance.—This bureau is charged with the execution, under the supervision and control of the State Corporation Commission, of all laws relative to insurance, and to insurance, guaranty, indemnity, fidelity, and security companies and associations of every character and nature (who are assessed for the expense of maintaining the bureau), and fraternal and other beneficiary orders and societies. Its chief officer is the Commissioner of Insurance, and a deputy, with officers assigned to him by the commission in Richmond, Va.

The commissioner issues all licenses to foreign or alien companies and certificates of authority to all domestic companies, when satisfied they have complied with the laws, are solvent and otherwise qualified and have paid all fees, taxes, and charges. The commissioner may examine the condition of companies including those engaged in selling stock, etc. Companies insolvent or violating the law are reported to the commission, which may revoke their license or authority. All fires are to be reported in detail to the commissioner, who may examine into origin thereof, and if the fire seems, to be of criminal origin, he has the power of a trial justice for the purpose of investigation. He or the head officer of a fire department in a city or town may enter buildings (not dwellings) to remedy inflammable conditions. He also investigates excessive rates and reports to the General Assembly. (Code §§ 4169-99, and Acts 1918, p. 123, amending §§ 4148, 4188; Acts 1920, p. 22, amending § 4180; and Acts 1922, amending § 4082.) For act providing for rate-making bureaus for insurance companies, see Acts 1920, p. 236.

§ 2. General provisions.—They are subject to all the general laws as to corporations in general (§§ 3776-3848, and

bonds, (Code, § 4204, as amended by Acts 1920, p. 834), and it must comply with the other prerequisites to doing business (see section 2, (2), above); and to these ends the commissioner makes examination into the company's affairs (§ 4206); the company must file with the Secretary of the Commonwealth a resolution consenting that service of process on the secretary shall be binding on it (§ 4207); every foreign and alien company is to file a copy of its charter (§ 4208); for doing business while company is in default, is punishable by fine or imprisonment or both (§ 4209); insurance companies (except mutual) must renew their license or authority every year (§§ 4210, 4226); ample provisions are made as to deposit of bonds, payment thereof, interest and lien of policyholders thereon, application of deposits to payment of claims, suit by commissioner, etc. (§§ 4211-20; and Acts 1920, p. 841, amending § 4211); company is to furnish forms for preliminary proof of loss (§ 4221); foreign companies are not to do business here except through resident agents (§§ 4222-6); discriminations are prohibited (§ 4222--5); the provisions in policies printed in type less than brevier (8 point) are not binding, but this does not apply to photographic copies of application, or parts thereof, made parts of the policy (Acts 1918, p. 539, amending § 4227); companies are required to make annual reports to the commissioner and other reports as required by him, and false statement in a report is punished as perjury (§§ 4229-30); violation of chapter is punished by fine from \$20 to \$200 (which goes to the Literary Fund), and is enforced by the State Corporation Commission (§§ 4231-2, 4234); foreign corporations are to be restricted like those states restrict Virginia corporations (§ 4233); list of agents are to be filed annually and as appointed and each agent must register (fee \$1) with the commissioner for each company represented by him for a period ending July 15th, each year, and if he solicits insurance without registering he is fined \$10 to \$100 (§ 4235, as amended by Acts 1922); charters of domestic corporations granted before December 31, 1908, are revoked if license required is not obtained (§ 4236); no stock is (under penalty) to be sold until the bureau has been furnished full particulars, and fiscal agent is required to give bond (§§ 4237-9); an insurance company is not to engage in

banking (§ 4240); for publishing a false or misleading statement the company forfeits \$100 (§ 4241); for insolvency and certain disobedience or default, commissioner may, on rule to show cause, take possession of property and conduct the business (§§ 4242-6).

§ 3. Mutual life insurance companies.—

(1) *Prerequisites to doing business.*—Such company must first have *bona fide* agreements for insurance with not less than 100 persons and have received therefrom at least \$10,000 in premiums, and have complied with all the prerequisites to doing business (see section 2, (2), above). (Code, § 4247.)

(2) *Punishment for fraudulent procurement of policy; effect.*—Any agent, physician, or other person knowingly securing a life insurance policy on a person without his knowledge or consent, or by misrepresentation, false, fraudulent or untrue statements be instrumental in securing such a policy on a person not in an insurable condition, is guilty of a misdemeanor, and the certificate or renewal is absolutely void if the insured participated in such fraud. (Code, § 4248, as amended by Acts 1920, p. 618.)

(3) *What defenses cannot be used after time limit.*—Where the policy contains a clause or provision limiting the time within which the policy may be contested, except for certain causes stated, no ground of defense not stated shall be used in defense to any action or suit after the time limit fixed. (Code, § 4248, as amended by Acts 1920, p. 618.) See, also, section 3, (5).

(4) *Other provisions as to such companies.*—See Code, §§ 424-58.

§ 4. Assessment or co-operative life and casualty companies.—

(1) *Prerequisites to doing business.*—Such a company, before doing business, must have a membership of not less than 200 insurable persons, with aggregate insurance of not less than \$50,000, and not less than 5 per cent. of each subscription paid in cash, to be held in trust as an emergency fund for the beneficiaries, and must have furnished the statement to the commissioner, mentioned in section 2, (2), above.

(2) *Penalty for fraudulently procuring policy; false statement perjury.*—See Code, § 4269.

(3) *Other provision as to such companies.*—See Code, §§ 4260-72.

§ 5 Fraternal benefit associations, orders, or societies.—

(1) *Definitions; to what societies chapter does not apply.*—A “fraternal benefit society” is a corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which makes provisions for the payment of benefits in accordance with section 4270 of the Code. (Code, § 4273.)

But this chapter (171) does not apply to grand or subordinate lodges of Masons, Odd Fellows, or Knights of Pythias (exclusive of the insurance department of the supreme lodge of the Knights of Pythias), or the Junior Order of United American Mechanics (exclusive of the beneficiary degree or insurance branch of the National Council), or to societies which limit their membership to any one hazardous occupation, nor to similar societies which do not issue insurance certificates, nor to an association of local lodges, which provides death benefits not over \$500 to one person, or disability benefits not over \$300 in any one year to one person, or both; nor to contracts of re-insurance business on such plan; nor to domestic societies which limit their membership to employees of a particular city or town, designated firm, business house, or corporation; nor to domestic lodges, orders or associations of a purely religious, charitable and benevolent description, not providing for a death benefit over \$100, or for disability benefits over \$150 to one person in one year. (Code, § 4302.)

A “lodge system” is where the society has a supreme governing or legislative body, and subordinate lodges or branches, with constitution, laws, rules, regulations, and ritual, and holding regular or stated meetings at least once a month. (Code, § 4274.)

A “representative form of government” is where the supreme legislature or governing body (meeting and electing officers, etc., at least every 4 years), is elected by the members, or delegates elected directly or indirectly by the members, and composed of such other members as is prescribed by its con-

stitution and laws, the elective members being in *majority* and having not less than two-thirds of the votes, nor *less* than the votes required to amend its constitution and *laws*. The members, officers, representatives, or delegates cannot *vote* by proxy. (Code, § 4275.)

(2) *Exempt from insurance laws; funds exempt from taxation.*—Except as provided in this chapter (171) as to these societies, they are governed entirely by this chapter, and are exempt from all provisions of the insurance laws of the State in every respect, and no new law applies to them, unless they are expressly designated therein. (Code, § 4276.)

Fraternal societies under this chapter (171) is declared to be charitable and benevolent institutions, and all its funds are exempt from all and every State, county, district, municipal, and school tax, other than taxes on real estate and office equipment. (Code, § 4303.)

(3) *Organization; costs; prerequisites to doing business; powers.*—They are organized like other non-stock companies (see *Corporations*, section 4; for costs, see section 5); but the articles of incorporation, and duly certified copies of the constitution, laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor and circulars to be issued by the society, and a bond for \$2500, with sureties approved by the Commissioner of Insurance, conditioned upon the return of the advanced payments to applicants if the organization is not completed within a year, must be filed with the commissioner, who may require such further information as he deems necessary. Whereupon, he issues a preliminary certificate authorizing the solicitation of members. Each applicant must pay at least one monthly payment; but no death or benefit certificates can issue until there are at least 250 applicants for at least \$100,000 of insurance; nor until 6 subordinate lodges or branches are established, embracing said applicants; nor until a list of the applicants is submitted to the commissioner (under oath of the president and secretary, or corresponding officers), with names, address, date approved, date initiated, name and number of the subordinate branch, amount of benefits to be granted, rate of stated periodical contributions which shall be sufficient for meeting the mortuary (or death) and disability

obligations contracted, according to standard tables named; nor until it is shown to the commissioner by the sworn statement of the treasurer or corresponding officer that at least 250 applicants have each paid at least one regular monthly payment, aggregating at least \$1250, to the sole credit of the death or disability fund. Whereupon the commissioner issues a permanent certificate of organization, and the supreme legislative or governing body (within one year thereafter) elects all officers, trustees, directors or other persons who are to have the general control and management of the affairs and funds of the society. The society has power to make, change, alter, add to, or amend the constitution and by-laws; and such other powers as are necessary and incidental to carry into effect the objects and purposes of the society. (Code, § 4284.)

The constitution and laws of the society may provide that no subordinate body, nor any of its officers or members can waive any of the provisions of the laws and Constitution of the society. (Code, § 4291.)

(4) *Membership*.—Members must be not less than 16 nor more than 60, who (except general or social members) must be legally examined by a physician and approved by the society; but no additional examination is necessary on application for disability benefits. (Code, § 4279.)

(5) *Benefits*.—There may be either death or disability benefits, but payment of disability benefits on account of old age must not commence under 70 years, and such benefits may include monument or tombstone and funeral expenses. Where permanently disabled or 70 years old, he may also be given all or a portion of the face value of his certificate. And benefit certificates may issue for any term of years, payable upon the death or disability within that time. Upon written application of a member, a society (which has readjusted its rules of contribution, as to contracts affected thereby) may accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half, against the certificate with interest payable or compounded annually at not less than 4 per cent. Where the reserve justifies, extended and paid-up protection or withdrawal equities may be granted a member, but not exceeding in value his portion of the reserve. (Code, § 4277.)

shall write more than one of the several kinds of **insurance** named above, unless it has a paid up capital, either **cash** or invested, of \$100,000; and then it must make a **report** and sworn statement of each kind of business done. No **company** shall write any policy for over 10 per cent. of its **paid up** capital and surplus, exclusive of the amount of any **such risk** secured by collateral, unless the excess is re-insured; **but this** limitation does not apply to any bonds or sureties **furnished** to the United States or any court or officer thereof. (Code, § 4305.)

(2) *When president and directors liable.*—If knowing the company to be insolvent they make or assent to further insurance, they are personally liable for any loss under such insurance. (Code, § 4305.)

(3) *Duty of company when amount due on loss by fire is less than amount on which premium is paid.*—In such cases, the company should refund the excess premium, with interest; but this does not apply to cases of partial loss where the policy is continued as to the residue of the amount named in the policy nor does it apply to purely mutely companies, paying its losses solely from assessment of its members. (Code, § 4306.)

(4) *Arbitrators and umpires to settle losses.*—They must be citizens and actual residents of Virginia, unless otherwise agreed; and must swear faithfully to discharge their duties and that they are in no manner in the employment of, nor related to, any individual affected thereby, or in the employment of any insurance company. (Code, § 4308-9.)

(5) *What provisions policy shall and shall not contain.*—The statute names nine provisions a policy against disease or accident or both must contain, and names three it must not contain, but the policy is held valid according to how it ought to have been, and the company is punished by a fine not over \$500. Policies of foreign companies are to contain such provisions as the State, etc., where organized prescribes shall be in such policies when issued here; and our policies when issued outside may contain any provision required by the law there. (Code, §§ 4315-21.)

(6) *Fire-insurance rate-making bureau.*—In 1920, an act was passed to provide for the organization, operation, and

supervision of fire insurance rate-making bureaus; to provide for a review of rates and rules fixed by such bureaus for insurance upon property in this State; to prohibit discrimination in such rates; to regulate all agreements between fire insurance companies or their agents affecting such rates; and empowering the Commissioner of Insurance to reduce fire insurance rates, and providing a penalty for violation. This act does not apply to mutual insurance companies on the assessment plan; nor to property protected in whole or part by automatic sprinklers and insured in connection with an inspection service; nor to the rolling stock of railroad corporations or property in transit while in the possession of railroad companies; nor to the property of such common carriers used or employed by them in their business of carrying freight, merchandise or passengers; nor to insurance upon or in connection with marine or transportation risks or hazards other than automobile insurance. (Acts 1920, p. 236.)

(7) *Other provisions as to such companies.*—See Code, § 4307 (limitation to size of risk assumed by fire companies, revocation of license for failure to comply, and appeal); § 4310 (when assets may not be distributed among the stockholders, re-insurance, and dividends); § 4311 (reserve); § 4312 (to prevent fire insurance companies from combining to fix the pay of agents); §§ 4313-4 (the issuance of fire insurance policies to an underwriter's agency); § 4315 (issuance against loss or damage from disease or accident or both, when policy to be delivered, and type in which to be printed); § 4322 (reserves for outstanding losses under certain insurance companies, and annual statement to be made to the Commissioner of Insurance by companies issuing accident policies on employees and others); § 4323 (how unallocated payments are to be distributed); § 4324 (how indebtedness for outstanding losses to be determined); § 4325 (how annual statement made out by corporations which have been issuing policies less than 10 years); § 4326 (deposits of alien casualty companies).

§ 7. Mutual insurance companies (other than life) generally.—

(1) *How organized; costs.*—Such a company is chartered by 20 or more residents subscribing and acknowledging articles of incorporation, specifying (a) the name, purpose and

location of principal or home office, which must be in this State; (b) the name and addresses of the directors, who in this age until the first meeting of the members; (c) the names and the residence of the incorporators. The name must contain the word mutual or not so similar to such existing corporations as to be confusing or misleading. The articles, executed in duplicate, are presented to the court or judge in vacation, who certifies thereon whether the same are properly executed and acknowledged; and then they, together with the receipt for the charter fee (if any), are presented to the Commissioner of Insurance, who indicates thereon his approval or disapproval, in the latter case giving reasons. He files one copy in his office and sends the other to the State Corporation Commission, who decides whether the applicants are entitled to a charter; if granted, they enter an order thereon to that effect and certifies the same to the Secretary of the Commonwealth (the company then having a legal existence), who records it, and certifies it to the clerk of the court where its principal office is, who records the same, and the fact of its recordation is endorsed thereon, and it is then returned to the clerk of the commission. The articles may be amended as in the case of other non-stock corporations (see § 3875 of the Code), or as provided in the articles, and the amendment must be approved, recorded, and filed as in case of the original articles. The amendment and by-laws must, within 30 days, be filed with the commissioner. (Acts 1920, p. 363, §§ 1-5.)

(2) *What laws control.*—Companies organized or admitted to do business under this act are not subject to any other insurance law, unless expressly so provided; except the provisions relating to “the issuance of policies, policy forms, the supervision of rates, prohibiting of discrimination and rebates, annual reports, reserves, taxes, and fees”, and they must make “its annual report in such form and submit to such examination and furnish such information as may be required by the State Corporation Commission through the Commissioner of Insurance”; and as far as practicable the examination of such foreign companies shall be in co-operation with the foreign insurance departments, and their annual reports such as are in general use throughout the United States. This act expressly repeals all conflicting laws; this repeal or act, however, is not to apply to affect any such existing companies,

domestic or foreign; but such companies may by resolution of a majority of its board of directors at a special meeting for the purpose, and duly certified by the president and secretary and approved by the commission through the commissioner, elect to adopt and become subject to this act; which may then effect such kinds of insurance as authorized by the act and specified in its charter then in force, or as then or thereafter amended, together with such additional kinds as are specified in the resolution. (Acts 1920, p. 363, §§ 17, 18, 22.)

(3) *Kinds of insurance or re-insurance company may make or accept.*—Such companies may make contracts of insurance or accept re-insurance, to the extent specified in its charter as follows:

“(a) *Fire insurance.*—Against loss or damage to property and loss of use and occupancy by fire, lightning, wind-storm, tornado, cyclone, hail, tempest, flood, earthquake, frost or snow, bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, explosion, fire ensuing, and explosion, no fire ensuing, except explosion by steam boilers or fly-wheels; against loss or damage by water caused by the breakage or leakage of sprinklers, pumps, or other apparatus, water pipes, plumbing, or their fixtures, erected for extinguishing fires, and against accidental injury to such sprinklers, pumps, other apparatus, water pipes, plumbing or fixtures; against loss or damage to any goods or premises of the assured and loss or damage to the property of another for which the assured is liable, caused by the leakage of roofs, leaders and spouting, or by rain and snow driven through broken and open windows and skylights, or caused by the contents of any tank or impact of any falling tank, tank platform or supports erected in or upon any building; against the risks of inland transportation and navigation; upon automobiles, airplanes, seaplanes, dirigibles or other aircraft, whether or not operated under their own power, against loss or damage by any of the causes of risks specified in this sub-section, including also explosion, transportation, collision, liability for damage to property resulting from owning, maintaining or using automobiles and including burglary and theft, but not including loss or damage by reason of bodily injury to the person.

(b) *Liability insurance*.—Against loss, expense or liability by reason of bodily injury or death by accident, disability, sickness or disease suffered by others for which the insured may be liable or have assumed liability, including workmen's compensation.

(c) *Disability insurance*.—Against bodily injury or death by accident and disability by sickness.

(d) *Automobile insurance*.—Against any or all loss, expense and liability resulting from the ownership, maintenance or use of any automobile or other vehicle.

(e) *Steam boiler insurance*.—Against loss or liability to persons or property resulting from explosions or accidents to boilers, containers, pipes, engines, fly-wheels, elevators and machinery in connection therewith and against loss of use and occupancy caused thereby, and to make inspections and issue certificates of inspection thereon.

(f) *Plate glass*.—To insure against the breakage of plate glass, local or in transit.

(g) *Burglary*.—To insure against property loss or damage by burglary, robbery, any larceny, any breaking or entry, or entry without breaking, of any house, building, ship, vessel or railroad car, and loss or damage by forgery.

(h) *Use and occupancy insurance*.—Against loss from interruption of trade or business which may be the result of any accident or casualty.

(i) *Miscellaneous insurance*.—Against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting fidelity and surety and life insurance." (Acts 1920, p. 364, § 6.)

(4) *Prerequisites to doing business*.—Such company cannot do business until it has complied with the following conditions and has been licensed by the State Corporation Commission acting upon a report from the Commissioner of Insurance:

"(a) It shall hold *bona fide* applications for insurance upon which it shall issue simultaneously or it shall have in force, at least 20 policies to at least 20 members for the same kind of insurance upon not less than 200 separate risks, each within the maximum single risk described herein; ,

(b) The 'maximum single risk' shall not exceed 20 per cent. of the admitted assets of three times the average risk or one per cent. of the insurance in force, whichever is the greater, any approved re-insurance taking effect simultaneously with the policy being deducted in determining such maximum single risk;

(c) It shall have collected a premium upon each application which premiums shall be held in cash or securities approved by the commissioner of insurance or in which insurance companies are authorized to invest and shall be equal, in case of a fire or steam boiler insurance to not less than twice the maximum single risk assumed subject to one fire or to one loss not less than \$10,000, and in any other kind of insurance to not less than \$50,000;

(d) For the purpose of transacting employer's liability and workmen's compensation insurance the applications shall cover not less than 1,500 employees, each such employee being considered a separate risk for determining the maximum single risk;

(e) Satisfy the State Corporation Commission through the Commissioner of Insurance that its financial condition, methods of operation and manner of doing business are adequate to meet its obligations to all policy-holders." (Acts 1920, p. 366, § 7.)

(5) *Corporation may hold policies in such company.*—Any public or private corporation, domestic or foreign, may take out policies in such company. (Acts 1920, p. 365, § 8.)

(6) *Voting power.*—Every member is entitled to one vote, or to a number of votes based upon the insurance in force, the number of policies held, or the amount of premiums paid, as provided in the by-laws. (Acts 1920, p. 365, § 9.)

(7) *Premiums; investment of assets; reserves.*—The maximum premium must be expressed in the application and policy. It may be cash and an additional contingent premium not less than the cash premium, or it may be solely cash; but no policy shall issue for a cash premium without an additional contingent premium unless the company has a surplus of at least \$100,000. (Acts 1920, p. 367, § 10.)

The company must not invest any of its assets except in securities approved by the commissioner or according to the

laws relating to the investment of assets of domestic *stock* insurance companies transacting the same kind of *business*. (Acts 1920, p. 367, § 11.)

The company must maintain unearned premiums or *other* reserves separately for each kind of insurance, upon the *same* basis as required of domestic stock insurance companies *trans-*acting the same kind of insurance; but any reserve for losses or claims based upon the premium income must be computed upon the net premium income after deducting any so-called dividend or premium returned or credited to the member. (Acts 1920, p. 367, § 12.)

And any domestic company deficient in the unearned premium reserve, may, nevertheless, come under this act, if it will within two years reduce such deficiency. (Acts 1920, p. 367, § 13.)

(8) *Advances to company.*—A director, officer, or member may advance to the company any money necessary, which with interest not exceeding 10 per cent. is to be payable only out of the surplus remaining after providing for all reserves and other liabilities, and shall not otherwise be a claim against the company or its assets. No commission or promotion expenses shall be paid in connection with such advancement. Such advances is to be reported in each annual statement. (Acts 1920, p. 367, § 14.)

(9) *Language of policies.*—Such company may insert in any form of policy prescribed by law, any provisions or conditions required by its plan of insurance not contrary to law. Conformation in substance to language and form is sufficient, if the policy includes a provision or endorsement reciting that the policy shall be construed as if in the language and form prescribed by law, and a copy of such policy and endorsement, if any, shall have been first filed with and not disapproved by the commissioner. (Acts 1920, p. 367, § 15.)

(10) *Foreign companies.*—“(1) Any mutual insurance company organized outside of this State and authorized to transact the business of insurance on the mutual plan in any state, district or territory, may be admitted and licensed subject to the approval of the State Corporation Commission as aforesaid, to transact the kinds of insurance authorized by its charter or articles to the extent and with the powers and

privileges specified in this act, and when it shall be solvent under this act, and shall have complied with the following requirements:

(a) Filed with the State Corporation Commission through the Commissioner of Insurance a certified copy of its charter or articles and a certificate of the supervising insurance official of the state, district or territory in which it is incorporated, that it is there organized and authorized to do such business as it desires to transact in this State.

(b) Filed with the State Corporation Commission through the Commissioner of Insurance a copy of its by-laws certified to by its secretary;

(c) Appointed the Secretary of the Commonwealth its agent for service of process, in any action, suit or proceeding in any court of this State, which authority shall continue as long as any liability shall remain outstanding in this State;

(d) Filed with the Secretary of the Commonwealth a resolution adopted by its board of directors, consenting that service of process or notice upon the Secretary of the Commonwealth in any action brought or pending in this State, shall be valid service of such process or notice upon said company;

(e) Filed a financial statement under oath, in such form as the Commissioner of Insurance may require, and have complied with other provisions of the law applicable to the filing of papers and furnishing information by stock companies on application for authority to transact the same kinds of insurance;

(f) If organized without the United States, make and maintain the deposit required of stock insurance companies formed without the United States transacting the same kinds of insurance.

(g) Its name shall not be so similar to any name already in use by any such existing corporation, company or association organized or licensed in this State as to be confusing or misleading.

(2) Upon compliance by any such company organized outside of this State with the provisions of this section, such company may be licensed and authorized to transact business in this State, subject to all the provisions of the following section (see section (2), above) and to the annual renewal

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of licenses at the times provided for the renewal of *licenses* of stock insurance companies transacting the same kinds of insurance; provided, further, that such company shall *have* a surplus of not less than \$200,000." (Acts 1920, p. 368, § 16.)

A foreign company not having a surplus of \$200,000 and assets at least equal to the unearned premium reserve and other liabilities, must assess its members liable thereto for such deficiency *pro rata* according to the several liabilities of their policies, unless the commissioner by written order relieved the company therefrom during a stated period. (Acts 1920, p. 367, § 13.)

(11) *Taxes*.—The taxable premiums or premium receipts of any such company, domestic or foreign, are the gross premiums for direct insurance, after deducting amounts paid for re-insurance upon which a tax has been or is to be paid, and deducting premiums upon policies not taken, premiums returned or cancelled policies, and any refund or return made to policy-holders other than for losses. The taxes paid by such companies into the State treasury through the Auditor of Public Accounts is in lieu of all fees, licenses, and taxes, State, county and municipal, except such taxes on real estate and tangible personal property as may be levied under provisions of law, and such fees as are specifically levied on corporations generally by section 157 of the Virginia Constitution. (Acts 1920, p. 369, § 19.)

(12) *Re-insurance*.—Such company, domestic or foreign, may by policy, treaty, or other agreement cede to or accept from any insurance company or insurer licensed anywhere in the United States, re-insurance upon the whole or any part of any risk with or without contingent liability or participation and with or without membership in such mutual insurance company; but no such re-insurance shall be effected with any company or insurer not first approved therefor by written order of the Commissioner of Insurance filed in his office. (Acts 1920, p. 369, § 20.)

See, also, *Licenses and License Taxes*, and *Taxation and Tax Bill*.

(13) *Punishment for violation of act*.—Any person or corporation violating this act is punished by a fine of \$50 to \$500, and the Commissioner of Insurance shall have power

to revoke the license of such person or corporation. (Acts 1920, p. 369, § 21.)

§ 8. Mutual assessment and co-operative fire, lightning, and storms insurance companies (for farmers).—

(1) *Definition.*—A mutual fire, lightning or storm company or association is a corporation or association which has no capital stock, but is organized and carried on for the benefit of its members, and which pays its losses solely from assessments upon its members without distributing any portion of its profits among its policy-holders or members in the shape of dividends, and which confines its business to this State. (Code, § 4327.) But this chapter (173) does not apply to such companies chartered before 1906. (Code, § 4340.)

(2) *How organized; costs; general laws as to corporations applicable to.*—Such a company or association is incorporated like private corporations in general—see *Corporations*, section 4; for costs, see section 5; but it shall not be required to have any capital stock, and no bonds need be deposited with the State Treasurer. (Code, § 4327.) The general provisions of the Code as to corporations in general (§§ 3776-3848, and Acts 1920, pp. 489, 495, 565; amending §§ 3780, 2846, 3847, respectively), apply to such company.

(3) *Prerequisites to beginning business.*—Such company, before beginning business, must have at least 25 members, collectively owning property of the value of \$50,000 or more, and agreeing to become insured therein, and furnish the Commissioner of Insurance a statement, under seal, verified by the oaths of its president and secretary, or two of its directors, showing the number and names of the subscribers, that each is solvent, the amount subscribed by each, and the particular territory to which the business is to be confined; and has obtained a license or certificate of authority to transact business, and has otherwise complied with the laws. (Code, § 4328.)

(4) *Such companies placed under supervision of Bureau of Insurance.*—Such companies are, by a recent act, placed under the supervision and control of the Bureau of Insurance; and they are to make reports to the Commissioner of Insurance at such times and in such form as he may require, and shall be annually licensed as other companies are licensed, ex-

cept they are exempt from the license tax, all other fees and the deposit of bonds. (Acts 1918, p. 170.)

(5) *Election of directors.*—The directors are chosen by the members, or the insured, at the company's regular meeting, each person insuring having one vote, which may be cast by proxy as prescribed by the by-laws, unless prohibited by the by-laws. (Code, § 4337.)

(6) *Who not to hold office.*—Non-residents of the territory (see section 8), but who own property therein, are not eligible to office in the company. (§ 4339.)

(7) *Provisions of policy; by-laws and regulations to be attached.*—The directors issues the policy signed by the president and secretary, agreeing in the name of the company to pay all damages to the property, not exceeding the amount insured, done to the property by fire, storm, or lightning during the time mentioned in the policy. And the policy may cover loss by lightning to live-stock which sometimes are at a separate or detached building and at other times at another. The policy must have attached thereto a printed copy of the by-laws and regulations of the company. (Code, § 4329.)

(8) *What property may be insured.*—No property is to be insured outside the prescribed territory, except where a member living near the line has property on both sides. Only dwelling houses on farms, barns, and their contents, and live-stock owned on such property, growing crops, and other property, not more hazardous, and buildings in villages or cities detached from other buildings such distances as the by-laws may prescribe, and their contents, or live-stock owned on such premises. (Code, § 4336.)

For insuring any other property, the officer is liable to a fine of \$10 to \$500, and for any loss to any one. (Code, § 4340.)

(9) *Obligations upon members; notice of loss; adjustment.*—Each person insured agrees to pay his *pro rata* share of all losses or damages sustained by any member, and such reasonable sum for expenses as the by-laws may require. A policy-holder sustaining a loss or damage must notify the president or secretary within 10 days, and the proper officers of the company shall at once proceed to ascertain and adjust the same as provided by its charter and by-laws. (Code, § 4330.)

For trust companies, which have been omitted from the insurance laws, and placed under the Banking Department, see *Banks and Banking*, section 1, (3).

(2) *Minimum capital*.—It must be not less than \$250,000. (Code, § 4341.)

(3) *Foreign companies*.—Any one acting and doing business for such company here is deemed its agent. Before transacting business here, there must be deposited with the State Corporation Commission a copy of the company's charter, and also a detailed sworn statement of the president and secretary, as required by law. (Code, §§ 4342-3.)

Such company with a paid-up cash capital of not less than \$250,000, who has complied with the law as to doing business here, upon proof of solvency, credit, and ability, satisfactory to the court, judge, or other officer authorized to approve such bond, may be accepted as surety thereon; and such surety may be released as provided by law for individuals. (Code, § 4346.)

(4) *Suits against such companies*.—An action or suit may be brought against such company in the place where it has become surety, qualified as fiduciary, or assumed any duty or obligation as principal or otherwise, or where the principal obligator may be sued. Where the State is a party the suit is in the circuit court of Richmond. (Code, § 4345.)

The company cannot, in such action or suit deny its corporate power to execute the instrument or assume the liability. (Code, § 4348.)

(5) *Power of attorney to execute bonds*.—The company may do business by agents as attorneys in fact under a power of attorney, with or without seal or scroll. Such powers of attorney (unless for an individual transaction) must be acknowledged and recorded in the county or city, or counties and cities, where they are to be exercised, and indexed in name of agent and principal.

Such powers of attorney are to continue until they expire by limitation therein or are revoked by the company by a writing under seal acknowledged and recorded, the clerk noting the fact in the margin of the deed book where the power of attorney is recorded, with a reference to where the revocation is recorded. (Code, § 4349.)

(6) *When companies to be accepted as surety.*—Such companies, foreign or domestic, complying with the law, are to be accepted as surety on bonds required or permitted to be given, but not for an amount in excess of 20 per cent. (or 10 per cent. in any one case) of the paid-up capital plus the surplus and undivided profits, unless they are secured for such excess by collateral insurance or deposit or deed of trust or otherwise. (Code, § 4350.)

(7) *Clerks to be furnished lists of such companies and changes therein.*—The Commissioner of Insurance is to furnish in April each year the clerks of courts a list of such companies, with a statement of assets and liabilities, and notify them of revocations of authority by the State Corporation Commission. (Code, § 4344.)

(8) *When expenses of securing bond allowed in settlements.*—A court, judge, or other officer whose duty it is to pass upon the account of any person or corporation required to execute a bond with surety shall, whenever a surety company is given as surety thereon, allow in the settlement of such account a reasonable sum for the expense of securing such surety, but such allowance shall not be made to any State, county, city, or town officer. (Code, § 4347.)

(9) *Contracts of surety between common carriers and their employees.*—See Code, § 3935, as amended by Acts, 1920, p. 20.)

§ 10. Industrial sick benefit companies and associations.

(1) *Definition.*—They are any corporation, joint-stock company or association (except fraternal beneficiary associations—see section 5, above), domestic, foreign, or alien, that collects premiums, dues, or assessments weekly from its members or policy-holders, and issues policies for weekly indemnity for sickness or accident in addition to death benefit, and is not required to maintain the legal reserve for said death benefits. (Code, § 4351.)

(2) *How organized; costs.*—See section 2, above.

They must state its purposes plainly in its charter, and shall be subject to the general laws governing such corporations. (Code, § 4357.)

(3) *Restrictions as to class of policy.*—The policy must provide for a weekly indemnity for sickness or accident, and

must not be a straight life, limited payment life, or endowment insurance, nor shall it provide a surrender value in case of lapse, nor greater death benefit than \$250, nor a greater weekly indemnity than \$10. (Code, § 4352.)

The policy may contain a provision for its cancellation of the sick benefit portion, under certain conditions. (Acts 1922, p. —.)

(4) *Beneficiaries.*—They are the wife, husband, family, or blood relatives of the insured or relatives by marriage or adoption, affianced (i. e., engaged) wife or husband, or a dependent, subject to the company's control as to the designation of beneficiaries within said classes, and said beneficiaries cannot be changed by assignment or will without the company's consent, to persons outside the above classes. (Code, § 4352.)

(5) *Capital required.*—Such company hereafter (1920) incorporated is now required by recent act to have a cash capital of at least \$100,000, fully paid in, and a cash surplus of at least \$50,000, and any such foreign company hereafter (1920) licensed to do business here, must have a cash capital of at least \$100,000 fully paid in, and, in addition, must deposit with the State Treasurer or with the proper officer of the State of its incorporation, for the general protection of its policyholders, \$100,000 in the interest-paying bonds or stocks of the United States, this State, or any municipality or county thereof, or of some other state, of the market value of \$100,000 in the city of New York, or in bonds and mortgages on unincumbered real estate in this State or of the state where organized, of at least double of the loan thereon, or such securities, stocks, bonds, or mortgages as may be accepted by the proper officer of the state of its incorporation as of the value of \$100,000. (Acts 1920, p. 266.)

Such foreign companies, at present doing business here, must after April 13, 1921, have the same amount of paid-up capital stock and make and maintain such deposit as may then be required by the then existing laws of the respective states of their incorporation, of companies of this State doing a similar business there, or as would be required of companies of this State if such companies were to apply for a license to do a similar business there, whether such license be applied for or not. (Acts 1920, p. 266.)

(6) *Taxes*.—See Code, § 4354.) See, also *Licenses and License Taxes*, and *Taxation and Tax Bill*.

(7) *Agents*.—Every agent, canvasser, or solicitor representing any such company are subject to the laws governing agents of insurance companies. (Code, § 4354.)

(8) *Licenses to do business*.—Such company must annually secure a license (which expires April 30th) from the Commissioner of Insurance, who must first be satisfied that the company has complied with the law, and is solvent, and for this purpose he may examine into its affairs as in the case of other insurance companies. (Code, § 4355.)

(9) *Foreign Companies*.—They may do business here upon conforming to the laws of the State as to the admission of foreign companies, when the Commissioner of Insurance is satisfied that they are solvent and in all respects qualified to do business here. (Code, § 4358.) See section 1, above, and *Corporations*, section 10, (2).

(10) *Companies under supervision of Bureau of Insurance*.—These companies are under the supervision of the Bureau of Insurance, and must make annual reports and pay the percentage tax as required of other insurance companies, and are subject to like penalties. (Code, § 4357.)

(11) *Excessive insurance; remedy*.—If the benefits in several different companies be more than 150 per cent. of his weekly salary, wage, or earnings, he shall not recover such excess, unless the previous policies are admitted by the assured in all the applications for insurance in excess of said sum; but if he has by misstatements or failure so to admit the previous policies, the excess benefits will be deducted from the death benefit. But the foregoing does not apply to a case where the application did not contain any question as to the amount of insurance carried by the applicant, nor where the application blank is printed in less than long primer (10 point) type. (Code, § 4359.)

§ 11. Miscellaneous provisions.—

(1) *Exchange of reciprocal and inter-insurance contracts*.—Recently there has been passed an act (largely to co-ordinate with the Workmen's Compensation Law), to authorize and regulate the exchange of reciprocal or inter-insurance contracts among individuals, partnerships, and corpora-

tions, domestic or foreign, providing indemnity among themselves from any loss which may be insured against under other provisions of the law, excepting fidelity and surety, and life insurance; empowering corporations generally to make such contracts, regulating process in suits on such contracts, and proscribing certain fees, taxes, and licenses, and penalty for violation. (Acts 1918, p. 630, as amended by Acts 1920, p. 256.)

(2) *Insurance provisions under the "Workmen's Compensation Law."*—See Acts 1918, p. 637, §§ 68-75; Pocket Code, § 5796b (6875;) Pollard's Code Biennial 1920, p. 629 (§§ 68-75).

(3) *Appointment of receivers for insurance companies.*—This act provides that an insurance company shall not be placed in the hands of a receiver, on the application of any person other than the Commissioner of Insurance, until the applicant has presented a copy of his bill to a board consisting of the said commissioner, and a member of the State Corporation Commission designated by it, and given reasonable notice thereof to the company; the company is allowed 10 days to file its answer with the board, whereupon the board sets a time for a hearing; and upon the hearing of witnesses, examination of books, etc., the board recommends to the court whether a receiver should be appointed, and if the board is divided, the court considers the case upon its merits. This act does not apply to a judgment creditor, whose judgment has remained 30 days "unpaid, unsuspended, or superseded." (Acts 1918, p. 636.) See, also, section 4242 of the Code.

(4) *Assignment of life insurance policies.*—Where a policy taken out by the insured himself or one having an insurable interest in his life, in good faith, and not for the purpose of assignment, may be assigned to any one for a valuable consideration, as any other chose in action. (Code, § 5767.)

(5) *Where action on policy brought.*—In case of policy on property or life, suit may be in the county or city wherein the property insured was situated at the date of the policy, or the person whose life was insured resided at his death or the date of the policy; or wherein the cause of action, or any part thereof arose (Code, §§ 6049-50); or as against corporations in general—see *Corporations*, section 11.

(6) *Declaration on policy of insurance.*—See section 6094 of the Code.

(7) *Where suit brought against insurance companies.*—See *Corporations*, section 11.

(8) *On whom and how process or notice served.*—As in case of corporations generally—see *Corporations*, section 12.

(9) *Acknowledgments of writings.*—See *Corporations*, section 14.

(10) *Offenses against insurance companies.*—Wilfully to burn any building or goods or chattels insured, with intent to injure the insurer, whether such person be the owner or not, is punishable by penitentiary 2 to 10 years. (Code, § 4436.)

Wilfully destroying a ship, vessel or other water craft, with intent to injure or defraud the insurer of the same or of any property on board, is punishable, if of \$50 or more value, by penitentiary 1 to 10 years; if of less value, it is a misdemeanor. (Code, § 4466.)

Poisoning or killing one's own horse, cattle, or other beast for the purpose of defrauding any insurer thereof, is punishable by penitentiary 2 to 10 years. (Code, § 4467.)

It is a misdemeanor punishable by a fine of \$100 to \$500, or jail 30 days to one year, or both, knowingly to make any false or fraudulent statement, upon application for insurance, and a wilfully false statement of a material fact as to death or disability, is perjury (Acts 1922, p.—).

(11) *Taxation.*—See Code, § 2206, and *Licenses and License Taxes*, and *Taxation and Tax Bill*.

(12) *Other Miscellaneous provisions.*—See § 764 (insurance on school buildings); §§ 1385, 1395 (on tobacco in public warehouses and publication of insurance); § 2726 as amended by Acts 1920, p. 216 (on county buildings); § 5431—Acts 1920, p. 556, repeals Acts 1918, p. 271 (in case of loan of fiduciary funds); § 6207 (foreign policy as evidence); § 3935, as amended by Acts 1920, p. 20 (contracts of surety between common carriers and their employees). For valuation of bonds and other securities by the Amortization Method, see Acts 1920, p. 835.

For organization and license of industrial insurance companies, see Acts 1920, p. 61.

For "An act to validate and authorize contracts of insurance upon the life of infants of the age at least 14 years and to make such infants competent to contract for the same; and, subject to certain provisos, to give a valid discharge of the contract or for any benefits available or money payable under the same, and to create certain liens thereon."—see Acts 1922, p. —.

INTEREST AND USURY

See *Banks and Banking; Building & Loan and Industrial Loan Associations, etc.; Credit Unions; Loans not over \$300*

I. Interest.

- § 1. Definition
- § 2. Legal rate of interest
- § 3. When interest allowed and to commence on judgments, etc.
- § 4. Mode of computing interest where there are several payments
- § 5. Compound interest
- § 6. Law of what place controls interest rate

II. Usury.

- § 7. Definition
- § 8. The essentials of usury
 - (1) A loan or forbearance of money or other thing
 - (2) Interest greater than allowed by law
 - (3) An agreement for the excessive profit or interest
- § 9. Transactions held not usurious
- § 10. Transactions held usurious
- § 11. Decisions as to interest and usury in general
- § 12. Pleading and proof in usury cases
- § 13. Excess over legal interest may be recovered back
- § 14. Application of payments on usurious contract
- § 15. Corporations cannot plead nor charge usury

The statutes and decisions of Virginia and West Virginia, on the subjects of Interest and Usury, or "Money and Interest," as their Codes have it, are practically uniform and the same, as in most other cases.

For a monographic note on Usury, see 26 Grat. 698, Va. Rep. Anno.; and for West Virginia decisions, see Justis' An-

notations, chap. 96, §§ 1 to 6; see also a Va. and West Va. Digest, titles *Interest* and *Usury*.

I. INTEREST

§ 1. **Definition.**—Interest is the compensation paid by a borrower for the loan or forbearance of money or other thing. “Forbearance” is giving a further day for the return of the money or other thing. (23 Grat. 225.)

§ 2. **Legal rate of interest.**—It is 6 per cent. per annum and a larger rate is forbidden (Code, § 5551); but a licensed banker or broker or any corporation authorized by law to make loans or to purchase or discount bonds, notes or other paper, may make loans or discount such papers at “one-half of one per cent. for 30 days” (i. e., 6 per cent. for 360 days), with a minimum fee of 50 cents on loans or discounts for 30 days or more, and may receive such interest in advance. (Code, §§ 5551, 5553.) Indeed, individuals have the same right as banks as to taking interest in advance at one-half of one per cent. for 30 days (2 Grat. 372). A banker may charge more under the “small loan law,” or as a broker in negotiating or securing loans upon real estate security—see *Loans not over \$300*, section 10, or *Banks and Banking*, section 6, (10); and *Brokers*, section 7, (2). Also, an attorney may charge brokerage for negotiating loans—see *Brokers*, section 7, (2).

§ 3. **When interest allowed and to commence on judgments, etc.**—In any action, the jury may allow interest on the sum found by their verdict or any part thereof, and fix the period at which the interest shall commence, and it continues until the judgment on the verdict is paid. If the verdict does not allow interest, the sum found bears interest from date. Where no jury, a decree or judgment may be entered for interest in the principal sum recovered until paid. (Code, § 6259.) In the case of office judgments, interest runs from the time the debt become payable, or the time specified in the note, etc. (Code, § 6134).

In the case of judgments upon protested negotiable instruments, interest runs from the date of the protest (Code, § 5760).

Interest follows the principal as the shadow follows the

substance (4 Rand. 157); so when a debt is due it begins to draw interest, whether interest is expressly agreed upon or not; on accounts that have been settled, interest runs from the settlement, unless understood otherwise; and where a note or bond is payable at a future day, with interest, the interest runs from the date; and this is expressly provided in the case of negotiable instruments, and if undated, the interest runs from the issue thereof (Code, § 5579). On debts payable on demand, interest is payable from the demand. (See 4 Min. Inst. 908-9.)

And as to purchase money, the first installment of which is to be paid when the deed is made, the possession being delivered at the time of the contract of sale, it is held in West Virginia (59 W. Va. 91) that interest is payable on the whole purchase money, though the seller be in default in making the deed, unless the purchaser set apart the purchase money for him and notify him of his readiness to pay, and do not himself use the money.

§ 4. Mode of computing interest where there are several payments.—Generally, interest should not be allowed upon interest. In computing interest on notes, bonds etc., upon which partial payments have been made, every payment is to be first applied to keep down the interest, and the interest is never allowed to form a part of the principal so as to carry interest. When the partial payment exceeds the amount of interest due when it is made, compute the interest to the time of the first payment, add it to the principal, subtract the payment, calculate the interest on the remainder to the time of the second payment, add it to the remainder, and subtract the second payment, and so on; but where the payment, is less than the interest to that time, do not add the interest or subtract the payment, for that would leave a balance of interest in the principal, but calculate interest up to a payment, when it and the one or ones preceding equal or exceed the interest. Or, to state the rule more briefly, compute the interest on the principal to the time when a payment, either alone or with preceding payments, shall equal or exceed the interest due on the principal; add the interest to the principal and subtract the payment or payments; and with this balance as a new principal, proceed in like manner as to the other payments.

It is not proper to compute interest on payments to a future day when the debt is to be paid or settlement made, and then credit the payment and interest upon the debt, principal and interest. (See 26 Grat. 903; 10 Leigh, 481; 3 Min. Inst. 387.)

For annuity table for computing annual interest, or the value of life estates, see *Dower*.

§ 5. Compound interest.—Compound interest, or interest upon interest, generally is not to be allowed except where interest has fallen due and become a part of a new loan. In special cases, compound interest is charged against fiduciaries—see *Administrators and Executors; Guardian and Ward; Trusts and Trustees*.

Where a deed provides for periodic payments of interest on deferred purchase money, but does not provide for interest on such interest, such unpaid installments of interest will not bear interest; probably that would be admissible (as a part of the purchase money) if it were so provided (61 W. Va. 280).

§ 6. Law of what place controls interest rate.—Where no rate is specified, the law of the place where the contract (not the note or other mere evidence of the agreement) is to be performed, controls, that place being *prima facie* where the contract is made. Where a particular rate of interest is specified in a contract made in one state or country and to be performed or discharged in another, if the rate is legal in either it is sufficient. (3 Min. Inst. 384-5.)

II. USURY

§ 7. Definition.—Usury is the excess over the legal rate charged to a borrower for the loan or forbearance of money or other thing (see section 1, above). Or as defined by section 5552 of the Code: "All contracts and assurances made directly or indirectly, for the loan or forbearance of money or other thing, at a greater rate of interest than" 6 per cent. per annum, "shall be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned or forborne."

§ 8. The essentials of usury.—To constitute usury, there must be:

(1) *A loan or forbearance of money or other thing.*—

An actual sale of bonds, notes, bills, stocks, goods, or other property, at less than the real value, however much, is not usurious; but a sale of a bond, note, etc., executed by the seller himself, is a loan, and the interest or discount must not exceed the legal rate. If the application be to borrow money, and in response, instead of money, or as a condition on which money is advanced, the lender furnishes stocks or other property at exorbitant prices, it is really a loan and usurious; so also, it is usurious to forbear a debt in consideration of any advantage whatever above lawful interest, such as new liability assumed in favor of the creditor, etc. An apparent assignment of a note, etc., may amount to a loan, as, where he sells at a greater discount than legal interest, and as assignor becomes liable by law or special agreement for the full amount. (3 Min. Inst. 307-8.)

(2) *Interest greater than allowed by law.*—It is not usury to agree for the lawful rate of interest to be taken in advance for any period (30, 60, 90 days, etc.) not exceeding a year, and this applies to individuals as well as bankers, brokers, etc., though the statute (see section 2, above) refers only to the latter. Where a purely voluntary payment, not insisted on by the creditor, nor agreed to be made by the debtor, interest accepted in advance for more than a year is not usury. (2 Grat. 372; 13 Grat. 511). (3 Min. Inst. 308.)

(3) *An agreement for the excessive profit or interest.*—

It is not usury, if the excess be *bona fide* the result of a mistake in the calculation, or from the use of interest tables based on a 360-day year, or a 30-day month. Nor is it usury if the excess be a penalty from which the debtor may by punctuality relieve himself, for in case of penalty the legal recovery is not the penalty but such damages as the party has suffered; nor if the principal amount be *bona fide* put in jeopardy, otherwise than by the debtor's insolvency, as, in the case contracts involving risks in general, or of loans of stocks, of bottomry (or mortgages on ships), of insurance, of purchase of annuities, etc.; nor if the excess is, in good faith, for services rendered on expenses incurred, as, where a commission merchant makes advances, and charges commission for selling, in addition to interest, or a broker negotiating a loan, or a

creditor charging for forbearance, besides interest, expenses *bona fide* incurred in the collection of the debt, as, a reasonable attorney's fee if suit be brought (119 Va. 439).

If a new agreement, free from all taint of usury, past or to come, is made, it is valid and binding; if it be made with new obligors, it is purged of the prior illegality, even though the arrears of illegal interest be still provided for, and though the obligee be the same; and so if it be made payable by the old obligees to a *bona fide* new obligee. (3 Min. Inst. 309, 311.)

§ 9. Transactions held not usurious.—The following transactions are held not usurious: Upon settlement of accounts, to take a note for the balance due, including interest, and to receive interest in such note (1 H. & M. 4; 4 Rand. 406; 10 Leigh 481; 20 Grat. 398; 21 Grat. 712; 26 Grat. 903); a fair purchase of a bond or of bank stock at any discount (2 H. & M. 14; 2 Munf. 36; 6 Munf. 472; 3 Leigh 577; 17 Grat. 21); to sell bank stock at a high rate or 8 per cent. stock at par (4 H. & M. 490; 4 Munf. 303; 21 Grat. 280; 26 Grat. 207); to purchase *bona fide* without notice of purpose for which executed (though at large discount) a bond given to payee for purpose of raising money for the maker, nor so to purchase a negotiable note endorsed by the payee for the benefit of the maker and sold by a broker, and though, when sold by an agent, the note is blank as to the payee, or though it be made for the benefit of the payee, or though a broker advances money to the maker before sale or though the note is payable to the maker's own order (2 Munf. 36; Gilmer 42; 5 Rand. 333; 5 Grat. 357; 18 Grat. 873; 20 Grat. 439; 76 Va. 419; 77 Va. 492); where property is sold *bona fide*, and not as a shift to cover a loan, the deferred payments, by agreement at the time of sale, may be made to bear any rate of interest that the parties may agree upon, the so-called interest being a part of the purchase price as the principal sum (20 Grat. 398; 23 Grat. 225; 96 Va. 50); a penalty inserted in a contract, from which the party may deliver himself, or where it is in the power of the party, by a compliance with his contract, to convert the penalty into a compensation for services rendered him by the other party (6 Munf. 433; 6 Rand. 22; 6 Leigh 517; 91 Va. 676); a bond with interest

till maturity, and 8 per cent. after maturity, the excess being a penalty, nor a deed of trust to secure same, given after its maturity and extending the time of payment, it furnishing security for the principal and only legal interest thereon until paid (91 Va. 676); to contract to take, for the loan of 142 shares of bank stock for a year, 30 additional shares, it being a contract in which the principal is at hazard (7 Leigh 501); where State Bank of N. C. discounted note, paying therefor, at face value, its own notes, which were below par, agreeing to pay note in Virginia or other northern bank notes, which were then at par (8 Leigh 238); bond given in 1863 for which borrower receives Confederate notes at three for one of gold, payable on demand in current funds, the contract being one in which the principal is at hazard (18 Grat. 708; 21 Grat. 286; but see 20 Grat. 555, 601); to contract to pay another a certain sum, called "brokerage," to negotiate and secure a loan for him, and also to pay attorney's fees for making abstract of title, though exceeding lawful interest (85 Va., 390; 56 W. Va. 610); dating renewal note on day of payment of first note, whereby the bank receives interest on each note for the same day (5 Leigh 251; 2 Grat. 372); to take one note bearing interest from date for several notes, one of which was undue and did not bear interest (79 Va. 458); where A. is to buy land as cheap as he can, and B. is to pay him \$900 for it, and A. pays \$750 for it, and conveys it to B., who gives his note for \$900 (9 Leigh 556; 85 Va. 621); to loan money to a debtor to pay an usurious debt, though the lender knew his purpose (83 Va. 59); a stipulation in a negotiable note for the payment of a reasonable attorney's fee if suit be brought (119 Va. 439, overruling 89 Va. 113 and 105 Va. 714; see Code, § 5564); where a building contract provides for 6 per cent. interest on loan and for payment of taxes and insurance premiums on property conveyed to secure the loan (104 Va. 464—see *Building & Loan and Industrial Loan Associations*).

§ 10. **Transactions held usurious.**—The following transactions are held usurious: A known practice to loan money at a legal rate, provided the borrower will purchase a horse or by stock at an unreasonable price (2 Rand. 109; 5 Rand. 132; 7 Leigh 26); a loan upon condition that the borrower will give

the lender an option to purchase his land at a price far below its value (116 Va. 812); where one sells property (slaves), with an agreement to resell at a certain time for a much larger amount (1 Leigh 147); a note valid when made but afterwards endorsed by a party (to whom it has regularly come) to a third person at a greater discount than legal interest (5 Rand. 333; see 16 Grat. 105); to take assignment of a bond at a greater discount than legal interest, and take a deed of trust from the assignor to secure payment of the bond (8 Grat. 22; 100 Va. 498); where a debtor, owning shares of bank stock, agrees with his creditor to pay him, at a future day, the market price of the stock at that day, or 50 per cent. more per share, at the creditor's option, with the dividends (8 Leigh 330); taking from the debtor, in renewal of a bond, his own bond for part, and an assignment of a third party's bond, the two aggregating more than the debt (1 Call 62); a bond given to close a series of transactions between the parties, though containing no usurious interest in it, yet having been given for money loaned on usury (11 Leigh 117); where a surety in a bond, who had given a deed of trust to secure the debt, executes another deed of trust to secure another debt of his principal due to the same parties, in consideration of the forbearance of the creditors to sell under the first deed of trust (6 Grat. 387); where a second contract embraces usurious parts of a first contract (23 Grat. 225); a bond given by A. to S., the consideration of which was in part a debt due from A. to S., in part debts of A. which S. undertook to pay, and for the balance bank and railroad stocks much above their market value (3 Grat. 173); an agreement to set the profits of mortgaged property against the interest on a loan where the profits exceed the legal rate of interest (2 Call 421-30; 12 Leigh 166); to purchase, in 1863, a \$5,000 town bond at public auction for \$11,050 Confederate currency worth ten to one of gold (20 Grat. 555, 601; but see 18 Grat. 708; 21 Grat. 386); on a loan on a bond, to pay 6 per cent. interest, and indemnify lender against state taxes on the bond (88 Va. 674); agreeing to give real estate security for debt and to pay costs and commission for attorney (4 Leigh 581); a sum allowed a creditor "for services rendered and settled," amounting to 9 per cent., it appearing that the pretended services

were to secure the debt for the creditor's own benefit (6 Munf. 541); where the lender, as the price for forbearance or extension of time, requires the borrower to pay his attorney's fees for suits against the lender in addition to legal interest (111 Va. 237); where, upon a loan of money, the lender contracts to receive, in lieu of interest, something which may be worth more than 6 per cent. (though it may be worthless), as, the dividends on bank stock (8 Leigh 330); the loan contract of the Old Dominion Building & Loan Association, prior to act as to such associations (95 Va. 670—See *Building & Loan and Industrial Loan Associations*).

§ 11. **Decisions as to interest and usury in general.**—To constitute usury both parties must consent to the unlawful interest, and there must be proof of a loaning and borrowing, or a forbearance to collect an existing debt (2 Call 111; 5 Munf. 187; 4 Rand. 406; 85 Va. 621). "Forbearance" is giving a further day for the return of a loan (23 Grat. 225).

The greater rate continues, in the absence of an agreement to the contrary, after the maturity of the debt and until it is paid (96 Va. 50; 29 Grat. 1).

Usury in a transaction is purged by the execution of a new bond with new parties, and the last bond is valid; but not where there is in fact the same principal through all the transactions (2 Va. Dec. 539.) A renewal of an usurious contract between the same parties, partakes of the infirmity of the original agreement (63 W. Va., 107).

Though usurious security be given for a pre-existing valid debt, such debt is still a valid obligation and may be recovered (2 Grat. 372).

A debtor and creditor made a full settlement, the debtor transferring to the creditor judgments and debts to the amount of his debt, agreeing to make good to creditor any deficit which might remain if any of them proved worthless. The debtor gave a note to cover the deficit, with a third party as endorser. Such note, it was held, was founded on a new contract—on a new consideration—and the usury in the previous notes given by the debtor to the creditor before their settlement does not affect it (26 Grat. 698).

The legislature may render valid contracts which were previously usurious (95 Va. 686; 96 Va. 119).

Usury cannot be pleaded against a *bona fide* holder for value of a negotiable note, who acquired it in due course before maturing (91 Va. 652; see Code, § 5619).

Under the statute, no part of the usurious contract is void, but is only "deemed to be for an illegal consideration as to the excess," etc. (98 Va. 168; see 5 Rand. 333.)

A debt to be usurious must be so in the beginning; it cannot be made so in subsequent accounts, if by punctual payment the debtor can avoid the payment of excessive interest (91 Va. 676; 90 Va. 708).

§ 12. Pleading and proof in usury cases.—See Code, § 5554, and note thereto, and Va. & W. Va. Digest title *Usury*.

§ 13. Excess over legal interest may be recovered back.—The suit or action must be brought within one year. The recovery may be had, notwithstanding the excess was paid to the party's indorsee or assignee. A sale of property conveyed to secure the debt, may be stopped by an injunction. (Code, § 5555.)

§ 14. Application of payments on usurious contract.—Where payments have been made on a usurious contract, and the debtor has failed to direct the application of the payments specifically, the court will first eliminate the usury, if any, from the principal of the debt, and apply the payments to the sum actually loaned or forborne (92 Va. 446).

Where, however, the borrower applies the payment to the interest, or the lender does so with the borrower's assent, the appropriation so made will not be disturbed, unless within one year thereafter a suit be brought for its recovery, or a suit be brought by the lender within that time, and the borrower sets up the usury against the lender's demand. (92 Va. 446; 93 Va. 821; overruling 4 Rand. 415; 80 Va. 379; 88 Va. 674; see 100 Va. 498; 95 Va. 670; 93 Va. 821.)

§ 15. Corporations cannot plead nor charge usury.—No corporation can, by defense or otherwise, avail itself of the usury laws, to avoid or defeat any interest it has contracted to pay, and interest though more than legal interest and though appearing on the face of the contract may be enforced against a corporation; nor, unless expressly authorized, can a corporation charge more than legal interest. (Code, §§ 5556-7.)

INTERPLEADER

(See Burks' *"Pleading & Practice"* (new ed.), same title.)

- § 1. Nature of interpleader
- § 2. Cases where interpleader lies
 - (1) Before a justice
 - (2) In court
- § 3. Various forms under "Interpleader"

§ 1. **Nature of interpleader.**—"Interpleader," while not used in the statutes, but only in the heading of chapter 256 of the Code, and borrowed from equity practice, is used to express the procedure by which, in a suit or in case of a levy of an execution, distress warrant, or attachment, the interests of a third person in the property, is litigated with the original parties and settled.

§ 2. **Cases where interpleader lies.**—Interpleader lies ;

(1) *Before a justice.*—Where an execution or distress warrant issued by a justice is levied on property claimed by a third person. Upon affidavit of the claimant, the officer, or the plaintiff that the property does not exceed \$20, the justice issues a warrant summoning both the creditor and debtor (and the claimant, if sued out by the officer) to show cause why the property should not be discharged from the levy. (Code, § 6035). See *Justice of the Peace*, div. I., section 3, (14), (e). For similar proceedings in attachment cases, see *Justice of the Peace*, div. II. ("Attachments Triable by a Justice"), section 12.

(2) *In court.*—Where an execution, distress warrant, or an attachment, issued by a justice, and levied on property over \$20 in value, or where an execution issued by a clerk and levied on property in any case, and a third person claims such property, or the proceeds or value thereof, upon application of the officer (where no indemnifying bond has been given) or the claimant (who must give a suspending bond) or the plaintiff, the court summons the plaintiff and the claimant, requiring them to state and defend their respective claims to or in the said property. (Code, §§ 6152, 6407.) See, also, *Justice of the Peace*, div II. ("Attachments").

For sale of property where no forthcoming bond is given, power of court to make orders, and costs, see Code, §§ 6153,

6158; indemnifying bond to officer, §§ 154-5; suspending bond, § 6156; forthcoming bond, § 6157.

Likewise, upon affidavit of a defendant that he claims no interest in the subject-matter of the action, but that some third party has a claim thereto and that he does not collude with him, but is ready to pay or dispose of the property as the court may direct, the court may make an order requiring such third party to appear and state the nature of his claim, and maintain or relinquish it, and in the meantime stay the said action (Code, § 6151.) For procedure thereon, see the statute.

For interpleader in case of warehouse receipts, see Code, §§ 1306-8, and *Warehouse Receipts*.

§ 3. Various forms under "Interpleader".—

No. 1. DISCLAIMER BY DEFENDANT OF INTEREST IN SUBJECT.

(Code, § 6151.)

C. C.

v

D. D.

_____ court of _____:

State of Virginia,

County of _____, to-wit:

This day personally appeared before me, the undersigned, a _____ in and for the county aforesaid, in the State of Virginia, _____, a (or the) defendant in the above action now pending in said court, and made oath that he claims no interest in the _____, which is the subject matter of said suit, but that _____ has a claim thereto; that he, the said defendant, does not collude with said _____, and that he is ready to pay or dispose of the said _____ as the court may direct.

Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 2. SUSPENDING BOND IN CASE OF INTERPLEADER.

(Code, §§ 6152, 6155; 4 Min. Inst., p. 1630.)

Know all men by these presents, that we, P. P. and S. S., are held and firmly bound unto L. M., sheriff of the county (or *sergeant of the corporation*) of _____, in the sum of _____ dollars (equal to double the value of the property), in gold, to be paid to the said L. M., for the payment whereof we bind ourselves and our heirs jointly and severally. Sealed with our seals and dated this _____ day of _____, 192—.

The condition of the above obligation is such, that whereas one C. C., upon a judgment recovered by him in the circuit (or corporation) court for the county (or corporation) of _____, against corporation) court for the county (or corporation) of _____, against

one D. D. has sued out a writ of *feri facias* against the goods and chattels of the said D. D., to satisfy the said C. C., the sum of _____ dollars, with interest thereon after the rate of _____ per centum per annum, from the _____ day of _____, 192—, until paid, and _____ dollars costs; which writ is directed to the sheriff for the said county (or *sergeant of the said corporation*) of _____, and J. B., deputy for L. M., the sheriff (or *sergeant*) aforesaid, has levied the same on _____ (describe the chattels levied on); and whereas the above-bound P. P. claims the said chattels so levied upon as his property, and desires that the sale thereof shall be suspended until the claim thereto can be adjusted. Now, if the said P. P. shall pay to any person or persons who may be injured by such suspension until the claim to the said property can be adjusted, such damages as he or they may sustain by such suspension, then the above obligation to be void, otherwise to remain in full force.

P. P. (SEAL.)

S. S. (SEAL.)

NO. 3. APPLICATION FOR INTERPLEADER.

(Code, §§ 6152-3; 4 Min. Inst., p. 1631.)

To the honorable the judge of the _____ court of the county (or *corporation*) of _____:

The application of your petitioner, P. P., respectfully shows that on the _____ day of _____, 192—, an execution of *feri facias* was issued from the clerk's office of the _____ court for the county (or *corporation*) of _____, at the suit of C. C., against the goods and chattels of one D. D. for the sum of _____ dollars, with interest thereon after the rate of _____ per centum per annum, from the _____ day of _____, 192—, until paid, and _____ dollars costs, and that afterwards, to-wit: on the _____ day of _____, 192—, the said execution was by J. B., deputy for L. M., sheriff of the county (or *sergeant of the corporation*) of _____, levied upon certain goods and chattels, as and for the goods and chattels of the said D. D., to-wit: (describe the articles with their values severally), and the said petitioner in fact says that the said goods and chattels, at the time of the issuing of the said writ of *feri facias* and long before were, and ever since have been, the property of the said petitioner, and not the property of the said D. D., and that the said D. D. had not then, nor at any time since has had, any right or interest therein, or in any part thereof. Wherefore your petitioner having duly executed and delivered to the said J. B., deputy sheriff (or *sergeant*) as aforesaid, a suspending bond in the penalty and on the condition required by law, he prays that as well the said C. C., as the said petitioner may be caused to appear before the _____ court of the county (or *corporation*) of _____, to state and litigate their respective claims, as touching the goods and chattels aforesaid, in order to a decision of their rights respectively touching the same, and your petitioner will ever pray, &c.

P. P.

Virginia:

County (or *corporation*) of ———, to-wit:

This day P. P. appeared in person before me, J. T., a justice of the peace in and for the county (or *corporation*) and state aforesaid, and made oath that the matters and things stated in the foregoing petition are true. Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

No. 4. ORDER FOR INTERPLEADER BY JUDGE IN VACATION.

(Code, §§ 6152-3; 4 Min. Inst., p. 1632.)

Virginia:

County (or *corporation*) of ———, to-wit:

Whereas it appears that P. P., the petitioner named in the petition annexed, has delivered to the within-named J. B., deputy for L. M., sheriff of the county (or *sergeant of the corporation*) of ———, a suspending bond, with good security, in the penalty and on the condition required by law, it is hereby ordered in the name of the Commonwealth, that the sheriff of the said county (or *sergeant of the said corporation*) of ———, do summon as well the said C. C. as the said P. P. to appear before the ——— court of the said county (or *corporation*) of ——— on the ——— day of the next term thereof, to state and litigate their respective claims as touching the goods and chattels in the said petition designated as levied on, in pursuance of the writ of *fiert facias* therein named, in order to a decision of their rights respectively, as touching the same. Given under my hand as judge of the circuit (or *corporation*) court for the said county (or *corporation*) of ———, this ——— day of ———, 192—.

R. T., Judge.

No. 5. ORDER FOR INTERPLEADER BY COURT IN TERM.

(Code, §§ 6152-3; 4 Min. Inst. 1632.)

Upon motion of P. P., who appears to have delivered, according to law, to J. B., deputy for L. M., sheriff of the county (or *sergeant of the corporation*) of ———, a suspending bond, with good security, in the penalty and on the condition required by law, and who complains that an execution of *fiert facias*, issued on the ——— day of ———, 192—, from the clerk's office of the ——— court of the county (or *corporation*) of ———, at the suit of C. C., against the goods and chattels of one D. D. for ——— dollars, with interest thereon after the rate of ——— per centum per annum, from the ——— day of ———, 192—, until paid, and ——— dollars costs, has been by the said J. B., deputy sheriff (or *sergeant*) as aforesaid, levied upon certain goods and chattels to-wit: one sorrel horse, of the value of ——— dollars, &c. (describing the articles levied on, and their values severally), as and for the goods and chattels of the said D. D., which goods and chattels, as the said P. P. avers, at the time of the issuing of the

said writ of *feri facias*, and long before, were, and ever since have been, and are now the proper goods and chattels of him, the said P. P., and not the goods and chattels of the said D. D., it is ordered that as well the said C. C., as the said P. P., be summoned to appear here on the ——— day of the present term to state and litigate their respective claims, as touching the goods and chattels aforesaid, in order to a decision of their rights severally touching the same.

NO. 6. DELIVERY OR FORTHCOMING BOND BY CLAIMANT TO REGAIN POSSESSION OF EFFECTS PENDING SUIT.

(Code, § 6157; 4 Min. Inst. 1632.)

Know all men by these presents, that we, P. P. and S. S., are held and are firmly bound unto C. C. in the sum of ——— dollars, in gold, to be paid to the said C. C., for the payment of which we bind ourselves and our heirs jointly and severally firmly by these presents. Sealed with our seals and dated this ——— day of ———, 192—.

The condition of the above obligation is such that whereas the above-named C. C., upon a judgment obtained by him in the ——— court of the county (or *corporation*) of ———, against one D. D., has sued out a writ of *feri facias* for taking the goods and chattels of the said D. D., which writ is directed to the sheriff of the said county (or *sergeant of the said corporation*); and whereas by virtue thereof, the following goods and chattels, to-wit: (specify the chattels levied on), have been taken by J. B., deputy for L. M., sheriff of the said county (or *sergeant of the said corporation*) of ———, as and for the goods and chattels of the said D. D., to satisfy the said execution, the amount whereof, at this time, including officers' fees and commissions, is ——— dollars; and whereas the said goods and chattels, so levied on as aforesaid, are claimed by the above-bound P. P. as and for his proper goods and chattels, and not the goods and chattels of the said D. D., and the said P. P. desires that they should remain in his possession, in whose possession the same were immediately before the said levy, and at his risk, until such day of sale as may hereafter be lawfully appointed, and has tendered the above-bound S. S. as his surety in such a bond as the law requires for that purpose. Now, therefore, if the said P. P. shall have the property so levied on as aforesaid, forthcoming at such day and place of sale as may be hereinafter lawfully appointed, then the above obligation to be void, otherwise to remain in full force.

P. P. (SEAL.)

S. S. (SEAL.)

NO. 7. APPLICATION, AFFIDAVIT, WARRANT OF INTERPLEADER, ENDORSEMENT, JUDGMENT, AND APPEAL, IN CASES BEFORE A JUSTICE.

[See Nos. 34 to 40, under *Justice of the Peace*, div. I. ("Warrants for Small Claims," section 4.)]

INTERROGATORIES

Interrogatories, or questions in writing, to an adverse party or claimant, may be filed in the clerk's office or before a commissioner and answers thereto enforced, and the same used as evidence, see Code, §§ 6236-8.

INTERSTATE COMMERCE

- § 1. Congress alone can regulate commerce
- § 2. When Federal court follows state construction of statute
- § 3. Police powers of State not affected
- § 4. Telegrams are interstate commerce, and telegraph companies instruments thereof
- § 5. When sales by agents not to be taxed
- § 6. When property belongs to interstate commerce

§ 1. **Congress alone can regulate commerce.**—Section 8, of article I., of the United States Constitution, provides that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." Interstate commerce, as recognized by an old and recent decisions, "consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property, and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

The power of Congress to regulate commerce is exclusive, and in matters of a national character requiring uniformity of legislation, the power is exclusive though Congress has not acted upon the subject; while the power of the State to regulate its own internal commerce is exclusive. But a State also has power to enact many laws which affect, as contradistinguished from regulate, interstate commerce, on the score of local police regulations, which power the states reserved and never surrendered to Congress, and is essentially exclusive; but if a local police regulation is in irreconcilable conflict with an express act of Congress regulating interstate commerce, it is unconstitutional. (175 U. S. 211; 93 Va. 159; 104 Va. 723.)

A statute to regulate the time, manner, and conditions under which cars shall be furnished for interstate shipment, if imposing unreasonable burdens upon interstate commerce, is unconstitutional. So Rule I. of State Corporation Commission is void. (107 Va. 171.)

§ 2. When Federal court follows State construction of statute.—In determining whether a statute is in violation of the commerce clause of the Constitution, the United States Supreme Court will adopt the construction of the statute put upon it by the State court of last resort, in the absence of exceptional conditions which sometime impel the Supreme Court to disregard inadmissible constructions given by State courts to their own statutes and State Constitutions. (161 U. S. 519; 128 U. S. 15.)

§ 3. Police powers of State not affected.—The right to enact laws to protect the lives, health, and property of the citizens of a state, and to preserve good order and the public morals, is a part of the police power reserved in the state, and though such laws may to some extent affect commerce and persons engaged in it, yet if they are enacted in good faith, for such police purposes, without discriminating against interstate or foreign commerce, and Congress has not acted on the subject, they do not constitute a regulation of commerce within the inhibition of the Constitution of the United States. Tested by this rule, the statute of Virginia prohibiting the running or transportation, on Sunday, of certain locomotives and cars, is not unconstitutional. Laws of this character are police regulations of the greatest utility for the physical and moral well-being of society. (93 Va. 749, overruling 88 Va. 95.)

Those subjects of commerce, which are national in their nature, admitting of only one uniform system or plan of regulation, such as the transportation of commodities, or the transportation of messages, between different states, is subject to the exclusive control of Congress, and, consequently, any regulation thereof by state legislation, whether Congress has legislated on the subject or not, is void. The legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and re-

motely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether *ex contractu*, or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carrier to the public or to individuals. In other words, if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is, and can be no law that does, until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what really exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displayed, covers the subject. (90 Va. 297, 300-1, 303.)

Notwithstanding the constitutional authority of Congress to regulate interstate and foreign commerce, the states have power to enact laws designed to secure the safety and comfort of passengers, employees, persons crossing railroads tracks, and adjacent property owners, and to make other regulations intended to promote the welfare and convenience of its citizens, although in their operation such laws may incidentally affect interstate traffic. (102 Va. 599.)

§ 4. Telegrams are interstate commerce, and telegraph companies instruments thereof—"Telegraphic communication, like the transportation of passengers and merchandise, is commerce, and such communication, when had between different States, is interstate commerce. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods; both companies are instruments of commerce; and their business is commerce itself." But these cases held the business to be one

can regulate such commerce, and the silence of Congress on the subject is equivalent to a declaration that such commerce shall be absolutely free. A license tax on such broker, is not a police regulation, but a revenue measure, and imposes an unlawful burden on interstate commerce. (98 Va. 91.)

§ 6. When property belongs to interstate commerce.—

The test applied to determine whether personal property sold is to be regarded as belonging to interstate (between points within a state) or to interstate commerce is whether or not the property which is the subject of the sale is within the jurisdiction of the State at the time the sale is made. If it is, then it is an interstate transaction and subject to State regulation. (110 Va. 235.)

Logs of non-residents in this State awaiting shipment to another state, is taxable. (108 Va. 135.)

The fact that tugs and barges are engaged in interstate commerce, does not exempt them from taxation (102 Va. 576).

INTOXICATING LIQUORS

I. State Prohibition.

- § 1. Statutes
- § 2. Ardent spirits defined
- § 3. Manufacture, transportation, sale, etc., of ardent spirits restricted
- § 4. Attempts, accessories; procedure; punishment
- § 5. Violations of provisions of the preceding sections; acting as agent, or seller or purchaser
- § 6. Penalties
- § 7. "Fine" and "forfeiture" construed
- § 8. Sentence to road force, upon failure to pay fine
- § 9. Penalty when fire arms or other deadly weapons are unlawfully found in possession
- § 10. Form of indictment under sections three, three a, four and five
- § 11. Wine or cider, manufacture, use, sale of, when not prohibited by this act
- § 12. Delivery, receipt, use, possession of ardent spirits unlawful; ardent spirits in houses of prostitution
- § 13. Devices to evade the provisions of this act

- § 14. Unlawful to manufacture stills; rewards
- § 15. When ardent spirits and containers contraband and forfeited; search warrant; arrest of offenders
- § 16. When accused sent on to court and recognizance required
- § 17. Obstructing officer in executing search warrant; penalty
- § 18. Jurisdiction of cases arising under this act
- § 19. Enforcement of city ordinance; territory contiguous to cities
- § 20. Trial of cases without a jury
- § 21. City or town ordinances regulating sale, etc., of ardent spirits
- § 22. Finding of ardent spirits or United States liquor dealers' tax receipt *prima facie* evidence; who to be tried
- § 23. When officer may break and enter houses
- § 24. Effect of payment of United States internal revenue tax; collectors' certificates as evidence
- § 25. Analysis of mixtures supposed to contain ardent spirits; chemist certificate as evidence
- § 26. Certain houses, etc., declared common nuisances
- § 27. Injunctions against nuisances as defined in this act
- § 28. Disposition of ardent spirits seized; disposition of stills, tubs, fermenters, etc., seized
- § 29. Drinking ardent spirits in public places
- § 30. Unlawful to be drunk in public place; penalty; jurisdiction to try such cases
- § 31. Transportation of ardent spirits
- § 32. Amount permitted to travelers
- § 33. Amount of ardent spirits a person may receive; containers in which shipped; record to be kept by common carriers; penalty
- § 34. Giving ardent spirits to minor, etc., sending minors and females for ardent spirits
- § 35. Persons of intemperate habits or found intoxicated, required to disclose from where they obtain ardent spirits; penalty for refusal
- § 36. Possession of ardent spirits by minors a misdemeanor
- § 37. Ordering or receipt, etc., of ardent spirits by female
- § 38. When bond required of persons convicted
- § 39. Effect when part of act declared unconstitutional
- § 40. Who deemed intoxicated; of intemperate habits
- § 41. Employees of hotel or place of public entertainment assisting guests to obtain ardent spirits; penalty
- § 42. Proprietors of houses of public or private entertainment permitting employees to assist guests to secure ardent spirits; failure to discharge convicted employee; penalty
- § 43. Keeping or sale of ardent spirits in hotels, etc., prohibited
- § 44. When licenses of hotels, etc., revoked
- § 45. Department of prohibition turned over to Attorney General and his assistants

- § 46. Powers of assistants, attorneys, agents, inspectors, and other employees
- § 47. Certain other officials charged with the enforcement of provisions of this act; fees
- § 48. Penalty for falsely representing an officer
- § 49. Certain employees of common carriers made special police for the enforcement of this act; jurisdiction
- § 50. Obstructing officer charged with enforcing this act; penalty; common carrier to discharge employee upon conviction; penalty
- § 51. Search of vehicles in which ardent spirits are being transported, vehicle to be seized and forfeited; proceedings; disposition of ardent spirits; arrest of occupants
- § 52. Search warrants
- § 53. Unlawful to use another's automobile or vehicle without his consent
- § 54. Penalty for leasing premises for the manufacture or sale of ardent spirits, etc.
- § 55. Act deemed exercise of police powers
- § 56. Certain allegations unnecessary in indictment; what proof sufficient
- § 57. Burden upon accused to prove exemption
- § 58. Use of ardent spirits in the home; home defined
- § 59. Change of venue
- § 60. Soft drinks defined
- § 61. License for sale of soft drinks
- § 62. Tax on non-resident manufacturers of soft drinks maintaining distributing or storage warehouses
- § 63. When possession of distilled liquor, one gallon of wine or three gallons of beer, or other malt liquor *prima facie* evidence of purpose to sell
- § 64. What persons may administer oaths
- § 65. When persons convicted required to work on public roads
- § 66. Encumbering estate to evade act
- § 67. Unlawful to grind or transport malt
- § 68. Unlawful to sell, give away, etc., malt other than in a private home
- § 69. Agents of authorities may purchase and transport ardent spirits contrary to the provisions of this act
- § 70. Certain local laws not repealed
- § 71. Incriminating testimony no excuse for not testifying
- § 72. Right of action against person causing intoxication
- § 73. Ouster proceedings against officer violating act
- § 74. Other sections of the Code cited

II. National Prohibition.

- § 75. Constitutional provision—"18th Amendment"
- § 76. "National Prohibition Act"
 - (1) What "intoxicating liquors" embrace

- (2) What acts prohibited
- (3) Punishment
- (4) Officers for enforcement of Act
- (5) Other provisions

I. STATE PROHIBITION

§ 1. Statutes.—The prohibition law of 1916 (Acts 1916, p. 215), as amended by Acts 1918, p. 577, is presented under sections 4581-4677 of the Pocket Code of Virginia 1920; and the law as amended by Acts 1920, is given in Pollard's Biennial 1920, pp. 543, etc., but the section numbers of the Act—not those of the Code—are cited. The Acts 1922 have greatly changed the law. Wherever the Revisors' sections as given in the Code do not conflict with the Acts 1918, those provisions are still law, and not superseded or repealed by the act—Code, § 6568; see preface to Pocket Code, p. VIII., and "Special Note" to Intoxicating Liquors, in Pocket Code, p. 298; also note in Pollard's Biennial 1920, pp. 210, 543.

We will not repeat the statutes here, but give only those sections of most interest, and refer to the others.

§ 2. Ardent spirits defined.—"The words ardent spirits, as used in this act, shall be construed to embrace alcohol, brandy, whiskey, rum, gin, wine, porter, ale, beer, all malt liquors, all malt beverages, absinthe and all compounds, or mixtures of any of them; all compounds or mixtures of any of them with any vegetable or other substance; alcoholic bitters, bitters containing alcohol, also all liquids, mixtures or preparations, whether patented or otherwise, which will produce intoxication; fruits preserved in ardent spirits, and all beverages containing more than one-half of one per centum of alcohol by volume, except as herein provided." (Code, § 4581; 1916, § 1; Acts 1918, p. 577, § 1.)

§ 3. Manufacture, transportation, sale, use, etc., of ardent spirits restricted.—"It shall be unlawful for any person in this State to manufacture, transport, sell, keep, or store for sale, offer, advertise or expose for sale, give away or dispense or solicit in any way, or receive orders for or aid in procuring ardent spirits, except as hereinafter provided." (Code, § 4583; Id., § 3.) [Acts 1922 adds § 35½, prohibiting the manufacture or sale of ardent spirits containing wood alcohol,

caustic potash, extract of fish berries or other poisonous substance under penalty of 1 to 10 years in penitentiary.]

§ 4. Attempts, accessories; procedure; punishment.—"It shall be unlawful for any person to attempt to do any of the things prohibited by this act or to assist another in doing, or attempting to do, any of the things prohibited by this act. And on an indictment for the violation of any provisions of this act the jury may find the defendant guilty of an attempt, or of being an accessory, and the punishment shall be the same as if the defendant were solely guilty of such violation." (Code, § 4583a; Id., § 3a.)

§ 5. Violations of provisions of the preceding sections; acting as agent of, seller or purchaser.—"If any person who shall violate any of the provisions of section three and three-a of this act, and any person, except a common carrier, who shall act as the agent or employee of such manufacturer or such seller, or person in so keeping, storing, offering or exposing for sale such ardent spirits, or act as the agent or employee of the purchaser in purchasing such ardent spirits, except as herein provided, shall be deemed guilty of a misdemeanor for the first offense, and of a felony for any subsequent offense committed after the first conviction; provided that the offense of drinking, giving away, or receiving ardent spirits contrary to the provisions of this act, shall not be deemed a felony in any case; and provided, further, that the purchasing or having in possession by any person of ardent spirits for personal use, shall in no case be deemed a felony, but the burden of proof that said ardent spirits are for personal use shall be upon the defendant." (Code, § 4584; Id., § 4.)

§ 6. Penalties.—"Any person who shall violate any of the provisions of this act shall, except as otherwise herein provided, be deemed guilty of a misdemeanor, and be fined not less than \$50 nor more than \$500, and be confined in jail not less than one nor more than six months. The penalty for any subsequent offense committed after the first conviction, which is not declared a felony by this act, shall be a fine of not less than \$100, nor more than \$5,000, and imprisonment in jail for not less than six months nor more than one year. Whenever, in this act, the violation of any provision is declared a felony, the person convicted of such violation shall be

punished by confinement in the penitentiary for not less than one nor more than five years, or, in the discretion of the jury, by confinement in jail not less than 6 months nor more than 12 months and by a fine not exceeding \$500; but where, upon the trial of any charge of a violation of this act, it shall appear to the court trying the case that there has been no intentional violation of any provision thereof, but an unintentional or inadvertent violation thereof, then such court shall instruct the jury that they cannot impose a jail sentence." (Code, § 4585; Id., § 5.) [See 121 Va. 850.]

Acts 1922 adds the following amendment to section 5: "But no court, nor the judge thereof in this Commonwealth, shall suspend the sentence of any person convicted of the illegal manufacture for sale of ardent spirits, or the transportation thereof in quantities exceeding one gallon, but where the evidence shows a quantity not exceeding one gallon, the court or judge may, in its or his discretion, suspend such sentence, or for any second or subsequent conviction of any offense against the prohibition laws of this State since the first day of November, 1916. The term 'second' or 'subsequent' offenses, as used in this act, are intended to mean second or subsequent offenses committed against this act or other prohibition laws of this State since November first, 1916."

§ 7. "Fine" and "forfeiture" construed.—By Acts 1922, the following section is added (as § 51 $\frac{1}{8}$): "Whenever the words 'fine' and 'property accruing to the State by forfeiture' or words of the same effect are used in the laws providing for the enforcement of prohibition in this State, shall be construed to mean the net amount remaining after deducting costs payable out of the State treasury from its appropriation made to pay the criminal charges of the State authorized under the said prohibition laws, also the amount authorized by the laws for the enforcement of prohibition in this State in connection with the seizure or sale of forfeited property, and all fines and proceeds accruing from the sale of forfeited property shall be accounted for by the officer receiving the same separately from other fines and forfeiture, and all costs payable out of the State treasury from the appropriation for the payment of criminal expenses in connection with enforcement of prohibition laws of this State shall be allowed and be paid sepa-

rately from other costs made a charge by law upon the treasury, payable from the appropriation for criminal expenses."

§ 8. Sentence to road force, upon failure to pay fine.—Acts 1922 adds the following section (as § 5 $\frac{1}{4}$): "Whenever a fine is prescribed for a violation of the laws for the enforcement of prohibition in this State, and such fine and the costs incident to the prosecution and conviction are not paid, the defendant shall be sentenced to the State Convict Road Force for a period not less than 3 months nor more than 6 months, and if the law prescribe a jail sentence and such is imposed, then the defendant shall be sentenced to the State Convict Road Force for the period of such jail sentence and for the additional period of not less than 3 months and not more than 6 months as herein provided."

§ 9. Penalty when firearms or other deadly weapons are found in possession.—Acts 1922 adds the following section (as § 5 $\frac{1}{2}$): "If any person shall unlawfully manufacture, transport, or sell any ardent spirits, as herein defined, and at the time of such manufacturing, transporting, or selling, or aiding or assisting in any manner in such act, shall carry on or about his person, or have on or in any vehicle which he may be using to aid him in any such purpose, or have in his possession, actual or constructive, at or within 500 yards of any place where any such intoxicating liquor is being unlawfully manufactured, transported or sold, any firearm, dirk, bowie-knife, razor, slung-shot, metal knucks or any weapons of like kind, he shall be deemed guilty of a felony, and on conviction shall be confined in the penitentiary not less than one year, nor more than three years, or, in the discretion of the jury, or the court trying the case without a jury, confined in the jail for not less than 6 months nor more than 12 months. Any such firearms, dirk, bowie-knife, razor, slung-shot, metal knucks or any weapons of like kind shall be confiscated as now provided by law."

§ 10. Form of indictment under sections three, three a, four and five.—"While any good and sufficient indictment may be used, an indictment for any first offense under section three, three a, four and five, of this act, shall be sufficient if substantially in the form or to the effect following:

State of Virginia_____

County of _____to-wit:

In the circuit court of_____county:

The grand jurors in and for the body of said county of _____and now attending said court at its _____term, nineteen _____upon their oaths, do present that _____within one year next prior to the finding of this indictment, in the said county of _____, did unlawfully manufacture, sell, offer, keep, store and expose for sale, give away, transport, dispense, solicit, advertise and receive orders for ardent spirits, against the peace and dignity of the Commonwealth of Virginia.

And if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce before the trial court, evidence of said former conviction, and shall not be permitted to use his discretion in charging said second offense, or in introducing evidence and proving the same, on the trial, provided that the failure to charge former conviction shall not invalidate the indictment.

If the offense is committed in a city the word 'city' shall be substituted for county, the proper court having jurisdiction substituted for circuit court, and the name of the city for the name of the county." (Code, § 4587; 1918, p. 577, § 7.) (121 Va. 814-15, 820, 850; 122 Va. 916-17.)

§ 11. Wine or cider, manufacture, use, sale of, when not prohibited by this act.—"The provisions of this act shall not be construed to prevent any person from manufacturing for his domestic consumption at his home, but not to be sold, dispensed or given away, except as hereinafter provided, wine or cider from fruit of his own raising; or to prevent the manufacture from fruit of cider for the purpose of making vinegar not used as a beverage; and non-intoxicating cider, containing not more than one per centum of alcohol by volume, for use or sale." (Code, § 4588a; 1918, p. 577, § 8a.)

§ 12. Delivery, receipt, use, possession of ardent spirits unlawful; ardent spirits in houses of prostitution.—It shall be unlawful to deliver to, receive in, keep, store, dispense, sell or offer for sale, give away or use, or have in possession ardent spirits in any place, except as provided in this act.

It shall be unlawful to deliver to, receive in, keep, store,

dispense, sell or offer for sale, give away or use, or have in possession ardent spirits in a place reputed to be a house of prostitution, whether said house be a *bona fide* home or not.

Any violation of this section shall be a misdemeanor; any subsequent violation of delivering to, receiving in, keeping, storing, dispensing, selling, offering for sale, giving away, using or having ardent spirits in possession in a place reputed to be a house of prostitution shall be deemed a felony. (Id., § 17.) (122 Va. 916-17.)

§ 13. Devices to evade the provisions of this act.—

“The keeping, storing, or giving away of ardent spirits, or any shift, or any device whatever, to evade the provisions of this act, shall be deemed unlawful within the provisions of this act, and shall be punished as unlawful selling is punished.” (Code, § 4608; Id., § 18.)

§ 14. Unlawful to manufacture stills, or etc.; rewards.

—Acts 1922 adds the following section (as § 21¼): “It shall be unlawful for any person, firm or corporation, other than public service corporations, to ship or transport into the State of Virginia, or from one point to another within the State, distilling apparatus or material for the manufacture of the same or to manufacture distilling apparatus for the purpose of manufacturing whiskey, beer or any other ardent spirits, and any person, firm or corporation found with material in possession commonly used in the manufacture of distilling apparatus, shall be deemed *prima facie* guilty of manufacturing such apparatus, and upon conviction thereof, shall be fined not less than \$50 nor more than \$1,000, or confined in jail not less than 60 days nor more than 12 months, or both, in the discretion of the court or jury trying the case, and such material shall be declared contraband and confiscated. Nothing in this section shall prevent merchants and regular dealers from handling and offering for sale sheet copper, copper tubeing, or other metal stock usually carried by such dealers.”

Acts 1922, amending § 21½ of Act (as to registered and contraband stills), says:

“Whenever any still is seized under the provisions of this act and the party owning or operating the same is arrested the officer making the seizure and arrest shall be allowed a fee or reward of \$50 and upon conviction of said person, the

attorney for the Commonwealth shall receive a fee of ten dollars, which shall be taxed against the defendant and collected as other costs in the manner provided by law"; and adds the following amendment: "And the fees or rewards herein directed to be paid shall be paid, anything in the charter of the cities and towns in this Commonwealth to the contrary notwithstanding. And if for any reason the said sum of \$50 cannot be collected from the defendant after conviction, the said officer making the seizure and arrest shall be paid the sum of \$25 to be paid as now prescribed by law for the payments of costs in criminal cases. And said officer shall be allowed the sum of \$10 for the seizure and confiscation of a copper still, and \$2.50 for the capture of any still made of material other than copper, provided such still has a capacity of not less than five gallons, said still, cap and worm to be delivered to the sheriff of the county, or sergeant of the city, who shall report same to the judge of the circuit or corporation court of the county or city in which such seizure and delivery is made, upon whose certificate said sums respectively shall be paid by the auditor of public accounts as other criminal expenses are paid, and such sheriff, upon the order of the judge of his court, shall forthwith dispose of such stills as is herein provided. All persons found at a distillery where whiskey, beer or other ardent spirits are being manufactured shall be deemed *prima facie* guilty of manufacturing the same or aiding and abetting in such manufacture and upon conviction thereof shall be subject to the same penalties as if manufacturing the same."

Supervisors may offer \$50 reward for capture of illicit still—see Acts 1918, p. 559, as amended by Acts 1920, p. 585; Pollard's Code Biennial 1920, p. 531; and Pocket Code, § 4611b.

§ 15. When ardent spirits and containers contraband and forfeited; search warrant; arrest of offenders.—"All ardent spirits and containers in which ardent spirits are manufactured, kept, stored, possessed, sold or in any manner used in violation of the provisions of this act shall be deemed contraband and shall be forfeited to the Commonwealth, provided the provisions of this act shall have no application to ardent spirits stored in *bona fide* homes prior to November 1,

1916, or to ardent spirits acquired in accordance with the provisions of chapter 146 of the Acts of Assembly of Virginia, approved March 10, 1916, so long as the same shall not be used in violation of the provisions of this act.

If there be complaint on oath that ardent spirits are being manufactured, sold, kept, stored, or in any manner held, used or concealed in a particular house, or other place, in violation of law, the justice of the peace, police justice, circuit or city judge and mayor of any city or town to whom complaint is made, if satisfied that there is reasonable cause for such belief, shall issue a warrant to search such house or other place for the ardent spirits. Provided that whenever such a warrant is issued for the search of any baggage room, house or other place, the property of a public service corporation, such warrant shall describe with reasonable certainty the baggage, container or package to be searched.

Every warrant shall be directed to an officer charged with the enforcement of this act and shall command him to search the place designated, either in day or night, and seize such ardent spirits and their containers and other things apparently used in violation of law and bring the same and the person in whose possession they are found before a justice of the peace, police justice, mayor, or court having cognizance of the case, and to make return of said warrant, showing all acts and things done thereunder, with a particular statement of the things seized and the name of the person in whose possession they were found, if any, and if no person be found in possession of said articles the return shall so state. A copy of said warrant shall be posted on the door of the building or room wherein the same are found, or if there be no door, then in any conspicuous place upon the premises.

Upon the return of the warrant as provided in this section, the justice of the peace, police justice, mayor or court shall fix a time not less than ten days and not more than thirty days thereafter, for the hearing of said return, when he shall proceed to hear and determine whether or not the articles so seized, or any part thereof, were used or in any manner kept, stored or possessed in violation of any of the provisions of this act. At such hearing if no claimant shall appear the justice of the peace, police justice, mayor or court shall declare

the articles seized forfeited to the Commonwealth and if such articles be not necessary as evidence in any pending prosecution shall turn the same over to the commissioner as is herein required. At such hearing any person claiming any interest in any of the articles seized may appear and file a written claim setting forth particularly the character and extent of his interest, whereupon, if the trial be before a justice of the peace, police justice, or mayor, he shall forthwith certify the warrant and the articles seized along with the claim filed therein to the circuit, corporation or hustings court having jurisdiction, which court shall docket the case, but any prosecution pending against any person for a violation of the provisions of this act in relation to said ardent spirits shall have precedence on the docket of such court. Thereupon the court shall hear and determine the validity of such claim. But upon such hearing the sworn complaint or affidavit upon which the search warrant was issued and the possession of such ardent spirits shall constitute *prima facie* evidence of the contraband character of the liquor and articles seized, and the burden shall rest upon the claimant to show, by competent evidence, his property right or interest in the articles claimed and that the same were not kept, stored, possessed or in any manner used in violation of any of the provisions of this act. If, upon such hearing, the evidence warrants, the court shall thereupon enter a judgment of forfeiture, and order the articles so seized to be turned over to the commissioner as is herein required. Action under this section and the forfeiture of any articles thereunder shall not be a bar to any prosecution under any other provision of this act.

If any person shall knowingly and wilfully make any false complaint under this section, he shall be guilty of a misdemeanor and fined not less than \$50 nor more than \$500 for each offense.

Nothing herein contained shall be construed to permit the issuance of general warrants whereby an officer may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence." (Code, § 4612; 1916, p. 215; 1918, p. 577, § 22.)

§ 16. When accused sent on to court and recognizance

required.—"If upon examination of any person charged with the violation of any of the provisions of this act, it shall appear to the justice, judge or mayor before whom the warrant is returned, that there is probable cause to believe the accused guilty, he shall be required to enter into a recognizance in the penalty and with security to be approved by the said justice, mayor or judge to appear before the next term of the circuit, hustings, or corporation court having jurisdiction, to answer any indictment found against him. All material witnesses shall also be recognized, with or without security, as the justice, judge or mayor may deem proper, to appear before the grand jury at the next term of the court having jurisdiction, to give evidence, and if the person so charged shall have been previously convicted of the violation of this act, the justice, judge or mayor may require of the person so charged, to give bond with penalty and security, to be approved by said justice, judge or mayor, conditioned that he will not violate any of the provisions of this act, until the charge against him has been tried or dismissed, and upon failure to give such bond, he shall be committed to jail until the bond is given, or he is discharged by the court." (Code, § 4613; Id., § 23.)

§ 17. Obstructing officer in executing search warrant; penalty.—"It shall be unlawful for any person knowingly to resist, impede, or obstruct, or in any manner to hinder or delay any legal officer having in his hands any search warrant, issued by any officer of this State having the right to issue the same, under the provisions of this act, in the execution of such warrant. Any person so resisting, impeding, obstructing, or in any way hindering or delaying any officer in the execution of a legal search warrant in his hands shall be guilty of a misdemeanor." (Code, § 4614; Id., § 23½.)

§ 18. Jurisdiction of cases arising under this act.—"The circuit, corporation and hustings courts having jurisdiction for the trial of criminal cases shall have exclusive original jurisdiction except as herein otherwise provided, for the trial of all cases arising under this act and for the trial of all civil cases involving the ownership of ardent spirits and other property seized under its provisions; except that mayors, police justices and others having jurisdiction for the trial of cases for the violation of the ordinances of the cities and towns

shall have jurisdiction to try cases arising under ordinances passed by their respective cities and towns as hereinafter provided, with the right of appeal to the defendant to the court having jurisdiction to try such appeal." (Code, § 4614; Id., § 24.)

§ 19. Enforcement of city ordinance; territory contiguous to cities.—"Nothing in this act shall be construed as conflicting with the jurisdiction of any mayor or police justice in the enforcement of city ordinances, prohibiting the manufacture, sale, or distribution of ardent spirits. For the enforcement of such ordinances, the mayor or police justice shall have jurisdiction over the territory contiguous to the city within three miles of the city limits, provided said three-mile limit does not interfere with the jurisdiction of the mayor or police justice of any other city or town, and where there is less than six miles between any city or town and another city or town the jurisdiction of the mayor or police justice of either city or town shall extend to one-half the distance between said cities and towns. In any prosecution before a mayor or police justice, the commissioner of prohibition shall be noticed by the said mayor or justice, in time to attend said trial, and the commissioner, his deputies and inspectors, shall have the same power in respect to such cases that he has in cases before the circuit court." (Code, § 4615; Id., § 25.)

§ 20. Trial of cases without a jury.—"Nothing in this act shall interfere with the jurisdiction of courts, as it at present exists, for the trial of criminal cases without a jury." (Code, § 4616; Id., § 26.)

§ 21. City or town ordinances regulating sale, etc., of ardent spirits.—"Cities and towns have full authority in this respect, notwithstanding a contrary provision in their charter, if their action be not repugnant to the Constitution and laws of the State." (Code, § 4617; Id., § 28, as amended by Acts 1922.)

§ 22. Finding of ardent spirits or United States liquor dealers' tax receipt prima facie evidence; who to be tried.—"Whenever ardent spirits shall be seized in any room, building, boat, car or other place, searched under the provisions of this act, the finding of such ardent spirits or of a United States liquor dealer's tax receipt in any such place shall be *prima*

facie evidence of the unlawful manufacturing, selling, keeping and storing for sale, gift, or use, by the person or persons occupying such premises, or by any person named in any United States internal revenue tax receipt posted in any room or found anywhere on said premises, or elsewhere, and the proprietor or other person in charge of the premises where such ardent spirits are found, or who is so named in such United States government tax receipt, shall be tried on the charge of manufacturing, selling, and keeping and storing for sale unlawfully, such ardent spirits, under the indictment and form prescribed in section seven of this act, and the liquor found upon said premises delivered to the commissioner." (Code, § 4618; Id., § 28.)

§ 23. When officer may break and enter houses.—"If in any house, building, boat, car, or other place, as is hereinbefore mentioned, the sale, offering, storing or exposing for sale of ardent spirits is carried on clandestinely, or in such manner that the person or persons engaged therein cannot be seen or identified by the officer or officers charged with the execution of a warrant, under any section of this act, any such officer may, whenever it is necessary for the arrest or identification of the person or persons, offending, or of seizing such ardent spirits, break open and enter such house, building, boat, car or place, or any room or part of any of them." (Code, § 4619; Id., § 29.)

§ 24. Effect of payment of United States internal revenue tax; collectors' certificates as evidence.—"The payment of the United States internal revenue tax, required of liquor dealers by the government of the United States, by any person or persons other than druggists, under this act, within this State, shall be *prima facie* evidence that such person or persons are engaged in keeping, selling, offering and exposing for sale, ardent spirits contrary to the laws of this State, and a certificate from the collector of internal revenue, his agents, clerks or deputies, showing the payment of such tax, the name or names of the person or persons to whom issued, shall be evidence of the payment of such tax in the examination or trial of any person or persons selling, keeping, offering and exposing for sale, ardent spirits, contrary to the provisions of this act." (Code, § 4620; Id., § 30.)

§ 25. Analysis of mixtures supposed to contain ardent spirits; chemist certificates as evidence.—"It shall be the duty of the State commissioner of agriculture, at the request of any officer, State, county, or municipal, including the commissioner of prohibition charged with the execution of this act and other laws of this State concerning ardent spirits as herein defined, to cause to be analyzed, forthwith, any mixture, supposed to contain ardent spirits as herein defined, and to return to the officer making the request a certificate of the chemist showing such analysis. The certificate of any chemist employed by the department of agriculture of this State, when signed and sworn to by him, shall be evidence in all prosecutions for violations of this act or of any other laws relating to ardent spirits as herein defined and all controversies touching the mixture analyzed by him; and if the person taking the sample shall label the same with a mark of identification and cause it to be delivered to the chemist for analysis, with a certificate stating that the container contains the actual fluid taken by him from the manufacturer, dealer, or the person storing, selling, or attempting to sell the same, the burden of proof shall be upon the accused to show that it is not the fluid so taken; but on motion of the accused and for good cause shown, the court may require the chemist making the analysis, and the person taking the sample to appear as witnesses and be subject to cross-examination." (Code, § 4621; Id., 30½.) [See 122 Va. 783.]

§ 26. Certain houses, etc., declared common nuisances.—"All houses, boat-houses, buildings, tents, club, fraternity, and lodge rooms, boats, cars and places of every description, including drug stores, where ardent spirits are manufactured, stored, sold, vended, dispensed, bartered, given away, furnished or used contrary to law by any scheme or device whatever, shall be held, taken and deemed common nuisances. Any person who shall maintain, or who shall aid or abet, or knowingly be associated with others in maintaining such common nuisances, shall be guilty of a misdemeanor, and judgment shall be given that such house, building, tent, boat-house ["boat" omitted], car or other place, or any room or part thereof be closed up, but the court may upon the owner giving bond in the penalty of not less than \$500, and with security

to be approved by the court, conditioned that the premises shall not be used for unlawful purposes, or in violation of the provisions of this act, turn the same over to its owner; or proceedings may be had in equity as provided by section 36 of this act"—see section 27, below. (Code, § 4622; Id., § 31.)

§ 27. Injunctions against nuisances as defined in this act.—"The commissioner, his deputies or inspectors, the attorney for the Commonwealth, or any citizen of the county, town or city, where such a nuisance as is defined in this act exists, or is kept or maintained, may, in addition to the remedies given in and punishment imposed by this act, maintain a suit in equity in the name of the State to abate and perpetually to enjoin the same. The courts of equity shall have jurisdiction thereof, and in every case where the bill charges, on the knowledge or belief of complainant, and is sworn to by two reputable citizens, that ardent spirits are sold, bartered, given away, distributed, dispensed or stored or used in any house, building, boat-house, club room, fraternity room, lodge room, hotel, boarding house, apartment house, lodging house, boat, tent, or any place contrary to the laws of this State, an injunction shall be granted as soon as the bill is presented to the court or judge in vacation, and no bond shall be required. The injunction shall enjoin and restrain the owners, tenants, their agents, employees, servants, and any person connected with said house, building or other place named in this section, and all persons whomsoever from selling, bartering, giving away, distributing, dispensing, storing, or using ardent spirits in said house, building, boat-house, club room, fraternity room, boat, tent, or other place named in this section, and shall also restrain all persons from removing any ardent spirits then on said premises until the further order of the court. Upon the hearing of the cause, when it shall have been matured and set for hearing as required by law, upon deposition of witnesses, documentary and oral evidence, if the court or judge in vacation, shall be satisfied that the material allegations of the bill are true, although the premises complained of may not then be unlawfully used, it or he shall continue the injunction against such house, building or place, if it shall be a drug store for one year, and in all other cases the injunction shall be perpetual.

Any person violating any of the provisions of the injunction granted under this section shall be summarily punished for contempt of court without the empaneling of a jury, by a fine of not less than \$100 nor more than \$500 and confinement in jail not less than one nor more than six months.

Whenever the court upon the hearing of any cause in equity under this section shall continue the injunction for one year or make it perpetual, it shall allow to the attorney for the complainant, or the commissioner, or the attorney for the Commonwealth, when he conducts the same without assistance, a reasonable fee, which shall be taxed and collected as other costs, provided that any fee allowed the commissioner under this section shall be paid into the treasury of the State." (Id., § 36.)

§ 28. Disposition of ardent spirits seized; disposition of stills, tubs, fermenters, etc., seized.—"Whenever by the terms of this act, any ardent spirits, containers, stills, still caps, worms, tubs, fermenters or other appliances used, or which can be used in connection with any still for the manufacture of ardent spirits shall be seized by any officer for violation of this act and forfeited to the Commonwealth, the same shall be turned over to the commissioner, who shall in his discretion cause 'he ardent spirits to be destroyed, or manufactured into alcohol and disposed of for scientific, mechanical or medical purposes; or he may sell the ardent spirits so turned over to him or alcohol distilled therefrom to any officer, drug store, hospital, laboratory, industrial enterprise, physician, dental or veterinary surgeon, Lee Camp Confederate Veterans, and any other eleemosynary institution of the State having the legal right to purchase the same. And said commissioner after so mutilating the stills, still caps, and worms as to render them unfit for the manufacture of ardent spirits, shall sell the same with the tubs, fermenters and containers, and after paying the costs of manufacturing the alcohol, and cost of transportation, storage and disposal of such ardent spirits shall turn over the net proceeds to the treasurer of the State for the benefit of the literary fund." (Code, § 4630a; Id., § 36a.)

§ 29. Drinking ardent spirits in public places.—"Any person who shall take a drink of ardent spirits or shall offer a drink to another, whether accepted or not, in any railroad

station, or at any boat landing, or in any day coach, or Pullman car, or any passenger train, or in any passenger boat, or in any street car, hack, jitney, or other public conveyance, or automobile, or in any street, or alley, highway or in any other public place, whether of like kind or not, or any person in charge of or employed in connection with any car, boat, hack, jitney, or other public conveyance or automobile, who shall procure for or assist in procuring, or who shall give any information or direction by which any person may secure ardent spirits in violation of this act, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than \$10 nor more than \$100." (Code, § 4631; Id., § 37.)

§ 30. Unlawful to be drunk in public place; penalty; jurisdiction to try such cases.—"Any person who, being intoxicated as defined in this act, shall appear in any public place in the State of Virginia, shall be fined not less than five nor more than ten dollars, and trials under this section may be had before a justice of the peace, police justice or mayor having jurisdiction where the offense is committed." (Code, § 4631a; Id., 37½.)

§ 31. Transportation of ardent spirits.—"No person or firm, and no corporation other than corporations authorized by the laws of this State to engage in the transportation of merchandise, as common carriers, shall bring into this State, for use in this State, from any point without this State, or transport from one point to another in this State, or from any point in this State to any point without this State, any ardent spirits, and no common carrier shall, except as otherwise specially provided in this chapter, bring into this State, from any point without this State, or transport from one point to another within the State, any ardent spirits except as follows: One quart of distilled liquors, or three gallons of beer, or one gallon of wine, may be brought to any person not a student at a university, college or any other school in this State, nor a minor nor a female (not the head of a family), in this State, for his own use, and not to be used contrary to the provisions of this chapter; provided every container in which such ardent spirits, wine or beer are carried shall, except as hereinafter provided, have a card not less than six by twelve inches, upon which shall be stated in letters not

less than one inch high, the kind and quantity of ardent spirits, wine or beer that it contains." (Code, § 4633; Id., § 39.)

For transportation of wine into State, see Acts 1920, p. 110, § 8f.

§ 32. Amount permitted to travelers.—"It is further provided that nothing in this act shall be construed to prohibit any person traveling from one point to another within the State, or from without the State, to any point within the State, from carrying in his baggage for the *bona fide* use of himself or his family, and not as a means of evading the intent and meaning of this act, and not to be used contrary to the provisions of this act, ardent spirits not in excess of one quart, which *bona fide* baggage it shall not be necessary to label or mark, as provided in this act. It shall be unlawful for any person to bring into the State from any point without the State, whether in his personal baggage or otherwise, within a period of thirty days, more than one quart of ardent spirits, and any justice of the peace, police justice, circuit judge or mayor of any city or town upon complaint and information given under oath that affiant has cause to believe and does believe that any person is violating this provision of this act shall issue his warrant directing such person and his baggage to be brought before him for examination in accordance with the provisions of the act." (Code, § 4636; Id., § 39.)

§ 33. Amount of ardent spirits a person may receive; containers in which shipped; record to be kept by common carriers; penalty.—"No person in this State shall receive or accept delivery from any railroad, steamboat, express company, or transportation company of any kind, or from any person whomsoever, any ardent spirits brought into this State from any point without the State, or ardent spirits transported from one point to another within this State except as follows: He may receive one quart of distilled liquor 'in a single container,' or three gallons of beer, or one gallon of wine, not oftener than once a month, provided that every container in which such distilled liquor, wine or beer is carried, shall have on it a card not less than twelve inches long, by six inches wide upon which shall be stated, in letters not less than one inch high, the kind and quantity of its contents, but a

container in which a quart or less is carried, may have on it a card six inches long by four inches wide, upon which shall be stated in letters not less than one inch high, the kind and quantity of its contents, and shall, before receiving the distilled liquor, wine or beer, sign a record made or kept alphabetically by the company transporting the distilled liquor, wine or beer, which shall show the name of shipper, name of consignee, quantity and kind shipped, and date of shipment, and shall make an affidavit that the said distilled liquor, wine or beer was brought into the State on his written order, and that he has not received any distilled liquor, wine or beer from any person, or from any place in excess of the quantity allowed by this act, within thirty days preceding the date of his affidavit, and that the distilled liquor, wine or beer will not be used in violation of the provisions of this act. Any person who shall receive such distilled liquor, wine or beer without signing such a record or making such affidavit, or who shall make a false affidavit, shall for the first offense, be guilty of a misdemeanor, and for a second or any subsequent offense, of making a false affidavit, shall be guilty of a felony." (Code, § 4638; Id., § 40.)

§ 34. Giving ardent spirits to minor, etc.; sending minor or female for same, etc.—By section 41 of act as amended by Acts 1922: "It shall be unlawful for any person to give ardent spirits to any person of intemperate habits or addicted to the use of any narcotic drug, or for any person, except a parent or guardian, to give any ardent spirits to a minor, except on the prescription of a physician, or to send a minor or a female to obtain ardent spirits.

It shall be unlawful for any person or persons whether parents or otherwise to send or use a minor or female in the purchase or sale of ardent spirits, or to deliver the same whether gift, purchase or sale, and upon conviction for a violation of this section, the same penalties shall be imposed upon such parents or other persons as are provided for under section five.

§ 35. Persons of intemperate habits or found intoxicated, required to disclose from where they obtain ardent spirits; penalty for refusal.—"Any person of intemperate habits or addicted to the use of any narcotic drug, found to

be intoxicated or under the influence of ardent spirits or any narcotic drug, shall be compellable in any proceeding had under this act to disclose from whom he has received ardent spirits or drug. For a failure or refusal to make such disclosure he shall be guilty of contempt and shall be fined not less than \$5 nor more than \$50 and be committed to the jail for a period not exceeding thirty days, unless such person shall sooner disclose from whom he has received such ardent spirits or drugs." (Code, § 4640; Id., § 41, as amended by acts 1022.)

§ 36. Possession of ardent spirits by minors a misdemeanor.—"It shall be a misdemeanor for any minor to have ardent spirits in his possession or under his control, whether belonging to himself or another, and upon conviction, he shall be fined not less than \$10 nor more than \$500, and, in the discretion of the court, he may be sentenced to jail or to a reformatory, for not less than one nor more than six months. And if it shall appear in any prosecution, under this section, that such minor is acting as the agent of another person, or under his influence or control, or by his direction, such person shall be deemed guilty of a misdemeanor." (Code, § 4641; Id., § 41, as re-enacted by Acts 1922.)

§ 37. Ordering or receipt, etc., of ardent spirits by female.—"It shall be unlawful for any female to order, receive or have in her possession any ardent spirits, except as permitted in this act." (Code, § 4642; Id., § 42.)

§ 38. When bond required of persons convicted.—"In addition to the penalties imposed by this act for the violation of any of its provisions, the court may, in its discretion, after conviction is had, for the first offense, and shall after every subsequent conviction, require the defendant to execute bond, with approved security, in the penalty of not less than \$500, nor more than \$5,000, conditioned that the said defendant will not violate any of the provisions of this act, for the term of one year. And if said bond shall not be given, the defendant shall be committed to jail until it is given, or until he is discharged by the court, provided that he shall not be confined for a longer period than six months; said bond when not given during the term of the court by which conviction was had, may be given before the judge thereof in vacation or before the

clerk of the court in which conviction was had." (Code, § 4643; Id., § 43.)

§ 39. Effect when part of act declared unconstitutional.—"If any section or provision of this act, or any part of any section shall be declared unconstitutional by the supreme court of appeals of Virginia, or the supreme court of the United States, the part so declared unconstitutional shall cease to be operative, but the remainder of the act and every section or part thereof not so declared unconstitutional shall continue to be the law of this State." (Code, § 4646; Id., § 46.)

§ 40. Who deemed intoxicated; of intemperate habits.—"Any person who has drunk enough ardent spirits to so affect his manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation, shall be deemed for the purposes of this act, to be intoxicated, and if he shall continue to use ardent spirits as a beverage during the period of one year, so as to produce the above results from time to time, he shall be deemed a person of intemperate habits within the meaning of this act." (Code, § 4649; Id., § 49.)

§ 41. Employees of hotel or place of public entertainment assisting guests to obtain ardent spirits; penalty.—"Any bell boy, elevator boy, or employee of any hotel or place of public entertainment in this State who shall procure for or assist in procuring, or who shall give any information or direction to any guest or patron of such hotel or house of public or private entertainment, or other person by which said guest or other person may secure ardent spirits, shall be deemed guilty of a misdemeanor, and upon conviction be fined not less than \$10 nor more than \$50 and be confined in jail or committed to the reformatory for not less than one nor more than six months." (Code, § 4650; Id., § 50.)

§ 42. Proprietors of houses of public or private entertainment permitting employees to assist guests to secure ardent spirits; failure to discharge convicted employee; penalty.—"Any proprietor of any hotel or house of public or private entertainment in this State who shall knowingly permit any bell boy, elevator boy, or other employee to, or who shall himself, procure ardent spirits for, or give direction

and information by which ardent spirits can be secured by any guest, patron or other person, or who when duly notified that any employee has been convicted of a violation of any of the provisions of this act, shall fail at once to discharge said employee permanently, shall be guilty of a misdemeanor, and when convicted, shall be fined not less than \$100 nor more than \$500, and for any subsequent offense shall be fined not less than \$100 nor more than \$500 and be confined in jail not less than one nor more than six months." (Code, § 4651; Id., § 51.)

§ 43. Keeping or sale of ardent spirits in hotels, etc., prohibited.—"It shall be unlawful for any keeper of a hotel, boarding house, rooming house or apartment house, even though he may reside in said hotel, boarding house, rooming house or apartment house, to keep in said hotel, boarding house, rooming house or apartment house or on the premises connected therewith, any ardent spirits, except for the use of himself and his family, and under a permit as required herein, and not to be sold, dispensed or given away by any shift or device whatsoever; and if the keeper of any hotel, boarding house, rooming house or apartment house shall knowingly permit ardent spirits to be sold, kept, stored, dispensed, given away, or used in any part of said hotel, boarding house, rooming house or apartment house, or on the premises thereof, except on the prescription of a physician, and except as provided in this act, he shall be deemed guilty of a misdemeanor (see § 4782), and may be proceeded against in equity as provided by this act." (Code, § 4652; Id., § 52.)

§ 44. When licenses of hotels, etc., revoked.—"If any keeper of a hotel, boarding house, pool room, Billiard room, bowling alley, store or other place requiring license, whether said license was granted by the court or not, or any employee with his knowledge, consent, connivance or acquiescence shall keep, store, dispense or use contrary to the provisions of this act any ardent spirits, in addition to the penalties prescribed for the violations of this act, the license of such place shall be revoked for one year for the first offense, and for the second offense no such license shall be granted at the same place or to the person convicted for a period of two years; provided further, that where the place is run under a lease by a person

or persons other than the true owner of the building, nothing herein shall operate to prohibit the issuance of a license to a new lessee who was not in any way connected as employee or otherwise with the former business therein conducted at the time of the revocation of the license." (Code, § 4653; Id., § 53.)

§ 45. Department of prohibition turned over to Attorney General and his assistants.—Acts 1922, (adding § 32 to the Act) turns the prohibition enforcement department (formerly executed by a prohibition commission, and any where in the act where "commissioner" is used, substitute "Attorney General") over to the Attorney General, whose duty it is to take care that all prohibition laws are faithfully executed; and he is authorized to appoint and employ and to remove and discharge at will, any assistants, attorneys, agents, inspectors, or other employees he may deem necessary. They are required diligently to inform themselves of all violations and to see that such violations are properly and vigorously prosecuted. For this purpose they have the powers of sheriffs and special police, and the Attorney General may associate himself or one or more of his assistants with the Commonwealth's attorney in a prosecution. He makes a detailed annual report to the Governor.

Section 32½ (also added to the Act) provides as to the failure of the assistants, etc., to act.

§ 46. Powers of assistants, attorneys, agents, inspectors, and other employees.—These and the officers mentioned in section 47, below, have power to administer oaths, take affidavits, and examine records, and with a warrant enter buildings, and without a warrant enter freight yards, passenger depots, baggage and storage rooms of a common carrier, any train, baggage, express, or freight car, and any boat, automobile, or other conveyance of any kind, where there is reason to believe that the law relating to ardent spirits is being violated; but they cannot search, without a warrant a berth or compartment of a Pullman car, and to do so is a misdemeanor punishable by a fine not over \$500 and removal from office. (Prohibition Act 1922, § 35.)

§ 47. Certain other officials charged with the enforcement of provisions of this act; fees.—By section 55 of the

Act as amended by Acts 1922: "It shall be the duty of all chiefs of police, police boards, police justices, special officers, sheriffs, attorneys of the Commonwealth, deputies, constables and justices of the peace of the counties and cities, and all mayors, sergeants and their deputies, justices of the peace and police of the cities, and towns of this State to enforce all of the provisions of this act, and the neglect, failure or refusal of such officers so to do shall be deemed misfeasance in office.

"For official services rendered in connection with violations of this act all said officers, including police officers of cities and towns, clerks of courts having jurisdiction to try such cases, and witnesses summoned on behalf of the Commonwealth, shall be entitled to and shall be paid the same fees as are now allowed by law in felony cases, said fees to be paid as are now or may hereafter be prescribed by law in felony cases other than violations of the revenue laws. [The rest is new.] Provided, however, on the payment of costs by the defendant or the prosecutor (other than the Commonwealth) in such cases as are misdemeanors under this act, the clerk of the court shall pay officers and others their fees as is provided in section 3513 of the Code as amended.

"The Commonwealth's attorney of the county or city in which preliminary hearings are to be had for the violations of this law, shall be notified by the trial officer a reasonable time before such hearings, in order that he may attend and a fee of ten dollars shall be taxed by the trial officer in favor of the attorney for the Commonwealth, to be paid by the defendant; provided further that when the defendant pleads guilty to the charge, the fee of the attorney for the Commonwealth shall be \$5, wherever he does appear at such preliminary hearing; and in every case where a conviction is had on the final hearing the attorney for the Commonwealth shall be allowed a fee of \$25 to be taxed with the costs and paid for by the defendant, inclusive of the fee of \$10 allowed at the preliminary hearing. Where there is no conviction, or the defendant is insolvent, then the fee to be paid the attorney for the Commonwealth shall be as in felony cases.

"For making an arrest for the violation of any of the pro-

visions of this or other prohibition laws of the State, the officer making such arrest, if the defendant is convicted shall be paid a fee of \$10, to be taxed as a part of the costs against such defendant, and if two or more officers unite in making such arrests, then said fee shall be apportioned among them."

§ 48. Penalty for falsely representing an officer.—To arrest or detain a person or to make any search by one falsely representing to be an officer is punishable by a fine of not over \$1,000 or jail not over one year, or both. (Acts 1922, adding § 55f (or e).)

§ 49. Certain employees of common carriers made special police for the enforcement of this act; jurisdiction.—"Captains of boats and vessels doing business in this State as common carriers, conductors of railroad trains, conductors and motormen of electric railways, police agents of railroad companies, station and depot agents of common carriers, operating in this State, shall be specially charged with the enforcement of this act and shall have the powers of special police, with jurisdiction to make arrests for violations of this act, upon the property of the common carrier by whom they are employed." (Code, § 4655a; Id., § 55a.)

Commanders of oyster boats are made special police for enforcement of this act—Pocket Code, § 4655b; Id., § 55b.

§ 50. Obstructing officer charged with enforcing this act; penalty; common carrier to discharge employees upon conviction; penalty.—"Any person who shall hinder or obstruct any officer of this State charged with the duty of inspecting baggage for ardent spirits, or the duty of ascertaining whether any ardent spirits is being illegally transported or stored, or otherwise charged with the duty of enforcing the provisions of this act, shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not less than \$100 nor more than \$1,000 and be confined in jail not less than two nor more than six months. Any transportation or public service corporation violating the provisions of this act shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not less than \$500 nor more than \$5,000 for each offense." (Code, § 4655c; Id., § 55c.)

51. Search of vehicles in which ardent spirits being transported, vehicle to be seized and forfeited; proceedings;

disposition of ardent spirits; arrest of occupants.—By section 57 of Act, as amended by Acts 1922: "When any officer charged with the enforcement of this law shall have any reason to believe that ardent spirits are being transported in any wagon, boat, buggy, automobile, or other vehicle, whether of like kind or not, contrary to law, he shall have the right and it shall be his duty to search such wagon, boat, buggy, automobile, or other vehicle, and to seize any and all ardent spirits found therein which are being transported contrary to law. Whenever any ardent spirits which are being illegally transported, or are being transported for an illegal use, shall be seized by an officer of the State of Virginia, he shall also take possession of the vehicle and team, or automobile, boat or any other conveyance, other than a conveyance owned and used by a railroad, steamboat or express company, but this provision shall not apply to barges, tugs, or small craft owned and operated by such railroad or steamboat companies, in which such liquor shall be found, and turn the same over to the sheriff of the county, or sergeant of the city in which such seizure shall be made, and such vehicle and team, automobile, boat or other conveyance shall be forfeited to the Commonwealth; and shall report the seizure to the attorney for the Commonwealth of the county or city in which such seizure shall be made, and to the commissioner in writing, and the attorney for the Commonwealth shall file any information in the name of the Commonwealth against such vehicle and team, automobile, boat, or other conveyance by the name or general designation. The information shall allege the seizure, and set forth in general terms the cause and grounds of forfeiture. It shall also pray the property be condemned and sold and the proceeds be disposed of according to law, and that all persons concerned in interest be cited to appear and show cause why the said property should not be condemned and sold to enforce the forfeiture, which information shall be sworn to by the attorney for the Commonwealth. Upon the filing of the information the clerk of the court shall forthwith issue a notice reciting briefly the filing of the information, the object thereof, the seizure of the property and citing all persons concerned in interest to appear on a specified day of the next term of the court, after the publication of said notice,

and show cause why the prayer of the information for condemnation and sale should not be granted, a copy of which said notice shall be posted at the front door of the courthouse by the sheriff of the county or sergeant of the city and published by him in some newspaper published in the county or city where such seizure is made, at least five days before the return of such notice, or if there be no newspapers published in the county or city, then in some newspaper having general circulation therein, which said publication shall be sufficient service of notice on all parties concerned in interest.

"Provided, that any person claiming an interest therein may give a forthcoming bond, in amount, double the value of the property so seized, conditioned that the vehicle and team, automobile, boat or other conveyance will be forthcoming in compliance with any order of the court having jurisdiction and to pay all costs and fees incident to such seizure.

"Any person interested may appear and be made a party defendant and make defense to the information, which must be done by answer under oath, and the proceedings shall conform as nearly as practicable to chapter 131 of the Code of Virginia of 1919. But, provided, further, that any equity or interest or (of?) any person who is in charge of such vehicle and team, automobile, boat or other conveyance, or who is an occupant of the same at the time such seizure is made, shall be forfeited by making such person or persons a party defendant, and the possession of such ardent spirits in such vehicle, automobile, boat or other conveyance, shall be *prima facie* evidence that the person in charge knew such ardent spirits were in such vehicle, automobile, boat or other conveyance, nor shall it be a ground of defense that such person or persons by whom said property was used in violation of law has not been convicted of such violation. The said information shall be independent of any proceedings against such person or any other for violation of law. For every information filed under this section there shall be allowed to the attorney for the Commonwealth a fee of \$10 and to the officer making the seizure and arrest a fee of \$10, which shall be taxed as cost. All fees herein prescribed, and costs incident to the seizure and forfeiture of an automobile or other vehicle

under this act, or any other prohibition law of the State, including commissions and cost of advertising, shall be deducted out of the proceeds of sale of such automobile or other vehicle, and the net balance turned over to the literary fund. In the event such seized automobile or other vehicle is not confiscated, the fees to the officer making such seizure and to the attorney for the Commonwealth, filing such information and conducting the prosecution, shall be one-half of the amounts herein stated, which fees shall be taxed against the Commonwealth and paid in the manner now provided by law.

"In every case the ardent spirits shall be turned over to the commissioner as herein provided.

"The officer making the seizure shall also arrest all persons in charge or occupying such team or vehicle and report all arrests made to the attorney for the Commonwealth of the county or city in which such arrests shall be made and to the commissioner in writing, and the attorney for the Commonwealth shall at once proceed against the person or persons arrested under the provisions of this act, who, upon conviction, shall be deemed guilty of a misdemeanor and shall be fined not less than \$50 or more than \$500, and confined in jail not less than one nor more than six months.

"Provided, that the forfeiture provided for in this section shall not apply to the transportation in personal baggage of the quantity of ardent spirits permitted by this act. And provided further, that whenever a quantity of ardent spirits is illegally transported in any automobile or other vehicle, and it shall appear to the satisfaction of the court from the evidence that the owner or lienor of such vehicle and team, automobile, boat or other conveyance was ignorant of the illegal use to which the same was put, and that such illegal use was without his connivance or consent, expressly implied, and that such lienor has prior to the commission of such offense duly recorded in the county or corporation in which the debtor resides, the instrument, creating such lien and that said innocent owner has perfected his title to the vehicle, if the same be an automobile, by proper transfer in the office of the secretary of the Commonwealth, as provided by law, then such court shall have the right to relieve such

owner or lienor from the forfeiture herein provided; provided, however, such lienor or innocent owner shall pay the costs incident to the capture and custody of such automobile or other vehicle and to the trial of said cause.

"Whenever any automobile or other vehicle or boat herein mentioned is seized under the provisions of this section, the officer making such seizure shall be allowed a fee or reward of \$25 to be taxed against the automobile or other vehicle or boat seized or confiscated. In the event the automobile or other vehicle or boat is not finally confiscated under this section, such fee shall be \$10, to be taxed against the confiscated vehicle or boat or the defendant, and collected as other costs in the manner provided by law. Where two or more officers unite in confiscating such automobile or other vehicle or boat, said fee be divided among them equally."

§ 52. Search warrants.—"All warrants issued under this act for the search of any automobile, boat, conveyance or vehicle, whether of like kind or not, or for the search of any trunk, grip or other article of baggage, whether of like kind or not, for ardent spirits, may be executed in any part of the Commonwealth where the same are overtaken, and shall be made returnable before any justice of the peace or police justice within whose jurisdiction they were transported or attempted to be transported contrary to law." (Code, § 4658a; Id., § 57½.)

§ 53. Unlawful to use another's automobile or vehicle without his consent.—Acts 1922 adds the following (as § 57¼): "It shall be unlawful for any person to use any automobile or other vehicle for the illegal transportation of ardent spirits without the consent of the owner, lienor or holder of a reservation of title of such automobile or other vehicle, and for a violation of this section any person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined the sum equal to the fair cash value of said automobile at the time of such seizure, to be ascertained by a jury, or the court upon proper inquiry. In default of the payment of such fine, such person shall be committed to the road force of this State for a period of not less than three months nor more than six months."

§ 54. Penalty for leasing premises for the manufacture

or sale of ardent spirits, etc.—Acts 1922 adds the following (as § 57½a): “Any person who shall lease, or rent, or cause to be leased or rented to another person for the purpose of the manufacture or sale of ardent spirits, any land, house, apartment or other premises or knowingly permit such land, house, apartment or other premises to be so used shall for the first offense be guilty of a misdemeanor and be fined not less than \$100 nor more than \$500, and be confined in jail not less than one month nor more than six months; and for the second or subsequent offense shall be guilty of a felony.”

§ 55. Act deemed exercise of police powers.—“This entire act shall be deemed an exercise of the police power of the State for the protection of the State, for the protection of the public health, peace and morals, and the prevention of the sale and use of ardent spirits, and all of its provisions shall be liberally construed to affect (effect?) these objects.” (Code, § 4659; Id., § 58.)

§ 56. Certain allegations unnecessary in indictment; what proof sufficient.—“In an indictment for the violation of any provision of this act, as to a sale or gift of ardent spirits, it shall not be necessary to allege a sale or gift of ardent spirits to a particular person, and it shall be sufficient for the conviction of the accused to prove a sale or gift contrary to law, within one year prior to the finding of such indictment. If more than one sale shall be proved within the year preceding the indictment the Commonwealth’s attorney shall not be required to say upon which sale conviction will be asked, but he may elect if he thinks proper to do so, and proceed by indictment against the accused for the other sales.” (Code, § 4661; Id., § 60.)

§ 57. Burden upon accused to prove exemption.—“When in any case prosecuted under this act, the accused claims the benefit of any exception in or to any section of this act, the burden shall be upon him to prove that he comes within the exception.” (Code, § 4661a; Id., § 60b.)

§ 58. Use of ardent spirits in the home; home defined.—“Nothing in this act shall prevent one, in his own home, from having and there giving to another ardent spirits, when the quantity of such ardent spirits is not enough to produce intoxication and when the quantity of ardent spirits in the

possession of the person giving it shall not exceed the quantity allowed by this act, to be kept in his home, and such gift is in no wise a shift or device to evade the provisions of this act; but the word 'home' as used herein shall be the permanent residence of the person and his family, not including the curtilage or outbuildings, and shall not be construed to include a rooming house, a club, fraternity house, lodge room or rooms, or place of common resort, or room of a guest in a hotel or boarding house or rooming house or apartment house. Nothing in this section or act shall be construed to mean that a person may not have a home in town or city, and another in the country." (Code, § 4662; Id., § 61.)

§ 59. Change of venue.—By section 63 of Act as amended by Acts 1922: "Upon the trial of any officer charged with the enforcement of the prohibition laws of the State, for an offense against the person or property of any one committed in the performance of his duties in the enforcement of such laws, on the affidavit of such officer or his attorney that in the opinion of such officer or attorney, such officer cannot obtain a fair trial in the county or city wherein such offense was alleged to have been committed, the court shall change the venue for the trial of such officer to some other county or city, wherein a fair trial of the alleged offense may be had. And in case of such change of venue the witnesses of the defendant shall be paid as if they were summoned for the Commonwealth."

§ 60. Soft drinks defined.—"The words 'soft drinks' as used in this act shall be construed to embrace and include any and all beverages, patented, domestic or otherwise, of every description and kind, which may be offered for sale, in this State, not embraced in the words 'ardent spirits' as defined in this act." (Code, § 4664; Id., § 64a.)

§ 61. License for sale of soft drinks.—"It shall be unlawful for any person, firm or corporation to dispense soft drinks without obtaining a license to do so from the circuit court of the county, or corporation or hustings court of the city in which county or city the privileges are to be exercised. No such license shall be granted unless it shall appear that notice of the application has been posted for ten days on the front door of the applicant's place of business and where the

soft drinks are to be sold. Any citizen may appear personally or by counsel in opposition to the granting of said license, and the court may in its discretion refuse to grant such license if convinced that the person applying is not a suitable person to exercise the said privilege. The clerk of the court shall receive for all services rendered by him in connection with the issuance of such a license a fee not to exceed twenty-five cents. All licenses issued under this section shall be granted subject to revocation by the circuit court of the county or the corporation or hustings court of the city where such person does business; and shall also be subject to suspension for cause during the vacation of the court by the judge of such court having jurisdiction, but shall be good until suspended or revoked.

Provided that it shall not be necessary to obtain such license to sell soft drinks at any place for benevolent or charitable purposes; provided, further, that it shall be unlawful for any dispenser of soft drinks to use any ardent spirits as a flavor or mixture.

Any person violating any of the provisions of this section of this act shall be deemed guilty of a misdemeanor and shall be fined not less than \$25 nor more than \$100 for the first offense, and shall be fined not less than \$50 nor more than \$500 for the second offense, and for every subsequent offense shall be fined not less than \$100 nor more than \$500, and confined in jail not less than one nor more than six months." (Code, § 4665; Id., § 64b.)

See, also, *Licenses and License Taxes*, section 48.

§ 62. Tax on non-resident manufacturers of soft drinks maintaining distributing or storage warehouses.—"Every non-resident manufacturer of soft drinks maintaining in this State distributing or storage warehouses for the sale of soft drinks by wholesale shall pay for such privilege the sum of five hundred dollars to the auditor of public accounts." (Code, § 4665a; Id., § 64c.)

§ 63. When possession of distilled liquor, one gallon of wine or three gallons of beer, or other malt liquor prima facie evidence of purpose to sell.—"The possession by any person of any ardent spirits, at any place other than his home, except as provided in this act and the possession in his

home of more than one gallon of distilled liquors, wine and malt liquor at any one time, shall, in any proceeding or prosecution under this act, be *prima facie* evidence that such person possesses such ardent spirits for the purpose of sale, provided that it shall be lawful for any person to carry from the depot of a common carrier to his own home any ardent spirits which he has received from such common carrier in accordance with the provisions of this act, or to carry from the depot any ardent spirits which he has received from a common carrier upon the written authority of the consignee or physician as provided for in this act, said ardent spirits to be delivered at the home of said consignee; or to carry any ardent spirits which have been delivered to him by a registered pharmacist upon the prescription of a physician as provided in this act." (Code, § 4666; Id., § 65.)

§ 64. What persons may administer oaths.—"Whenever an affidavit is required to be administered under the provisions of this act, the person who is to receive and file such affidavit shall have authority to administer the oath, and the same shall be as binding as if administered by any officer now authorized by law to administer oaths." (Code, § 4667; Id., § 66.)

§ 65. When persons convicted required to work on public roads.—"Whenever a person is convicted under this act for an offense punishable by confinement in jail, he may, for the first offense, be required to work out the term of his confinement on the public roads, and for the second offense he shall be sentenced by the court to work out his term of confinement on the public roads, unless the court shall be satisfied that his physical condition be such, upon the testimony of two reputable physicians after careful personal examination, as to make such work permanently injurious to his health, and in every such case the judge shall after consultation with the State commissioner of highways, by letter or otherwise, name in his order the camp to which the person convicted is to be sent." (Code, § 4669; Id., § 68.)

§ 66. Encumbering estate to evade act.—"Any person who shall transfer, alienate or encumber in any manner his estate, real or personal, with intent to evade any provisions of this act, and all persons aiding and abetting in such

evasions shall be deemed guilty of a misdemeanor for the first offense, and of a felony for every subsequent offense." (Code, § 4670; Id., § 69.)

§ 67. Unlawful to grind or transport malt.—"It shall be unlawful for any person to grind or transport malt in this State or any substitute for the same by whatever name it may be called to be used in the manufacture of ardent spirits, and the burden of proof shall be upon any person grinding or transporting malt to show that such malt is not to be used in violation of this act." (Code, § 4671; Id., § 70.)

§ 68. Unlawful to sell, give away, etc., malt, other than in a private home.—Acts 1922 adds the following (as § 70½): "It shall be unlawful for any person to sell, give away, transport, distribute, or have in his possession any malt, malted grain, or any mixture thereof other than in a private home, and all officers charged with the duty of enforcing the prohibition laws of this State or the United States, are authorized to seize any such malt, malted grain, or mixture thereof wherever found other than in a private home without a warrant and to destroy the same. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor."

§ 69. Agents of authorities may purchase and transport ardent spirits contrary to the provisions of this act.—"Nothing in this act shall be construed as prohibiting any person from purchasing or transporting ardent spirits contrary to the provisions of this act, when acting as the agent of the authorities charged with the enforcement of prohibition laws in the detection and conviction of violators of said laws, nor to prevent the commissioner from ordering the transportation of ardent spirits in or out of the State, or from one point to another within the State, when deemed necessary to carry into effect the purposes of this act, but in every such case a permit signed by the commissioner shall be pasted upon the container." (Code, § 4672; Id., § 71.)

§ 70. Certain local laws not repealed.—"None of the provisions of this act shall be construed as repealing, annulling or in any way abrogating or superseding the act of the general assembly, approved March 25, 1902, as amended, relating to the sale of ardent spirits in the counties of Tazewell, Giles,

Buchanan and Dickenson; or any other prohibitory act for any county or town, or any provision of any charter of any city or town in so far as said act or acts or charter provision restricts, prohibits or limits the sale, manufacture or delivery of ardent spirits beyond the provisions of this act, but this act shall be construed as supplemental to said act or acts and charter provisions and in aid thereof, and such special act or acts and prohibitive charter provisions, beyond the provisions of this act, are hereby expressly continued unrepealed, and the same shall remain with like force and effect as if this act had not been passed. Nor shall any provision of this act be construed as repealing any ordinance of any town or city in so far as the same restricts and limits beyond the provisions of this act the transportation, delivery, receipt, possession, sale, offering for sale, advertising for sale, or in any way dispensing, giving away or receiving orders or transmitting orders for ardent spirits as herein defined." (Code, § 4673; Id., § 72.)

§ 71. Incriminating testimony no excuse for not testifying; reputation.—By section 73 of Act, as amended by Acts 1922: "No person shall be excused from testifying for the Commonwealth as to any offense committed by another under this act by reason of his testimony tending to incriminate himself, but the testimony given by such person on behalf of the Commonwealth shall in no case be used against him, nor shall he be prosecuted as to the offense as to which he testified. It shall be competent in a prosecution for any offense against the prohibition laws of the State to prove the general reputation of the defendant as a violation of the prohibition laws."

§ 72. Right of action against person causing intoxication.—"Every wife, child, parent, guardian, or employer or other person who shall be injured in person or property or means of support by any intoxicated person in consequence of his intoxication, habitual or otherwise, such wife, child, parent or guardian, or employer, shall have a right of action, in his or her own name, against any person who shall, by selling, bartering, or giving away intoxicating liquors, have caused the intoxicating of such person for all damages actually sustained, as well as for exemplary damages; and a married

woman shall have the right to bring suit, prosecute and control the same, and the amount recovered the same as if unmarried; and all damages recovered by a minor under this act shall be paid either to such minor or his or her parent, guardian or next friend as the court shall direct; and all suits for damages under this chapter shall be by civil action in any of the courts of this State having jurisdiction thereof." (Code, § 4675; Id., § 74.)

§ 73. Ouster proceedings against officer violating act.—Acts 1922 (as § 77) provides that the Attorney General, upon its being brought to his attention that an officer charged with the enforcement of the prohibition law is or has (since the passage of this new act) himself violated the act, shall institute ouster proceedings against him. See, also, "*Ouster Law*."

§ 74. Other sections of the Code cited.—Person and commissioner defined—Code, § 4582; Acts 1918, p. 577, § 2; situs of sale when shipment made by common carrier—§ 4586; Id., § 6; hotels permitted to use certain cooking wines, and bath houses to use alcohol—§ 4588; Id., § 8; denatured alcohol or rum—§ 4588a; Id., § 8; medicines, toilet articles, flavoring extracts, etc.—§§ 4589-90; Id., § 8; druggists—§§ 4591-3, 4595; § 4599 as amended by Acts 1920, p. 806; §§ 4601-2; § 4605, as amended by Acts 1920, p. 83; § 4656; Id., §§ 8c, 9, 10, 14, 15, 56, and Acts 1922, amending § 14; Jamaica ginger—§ 4591a; Id., § 8e; dentists, physicians, and veterinary surgeons—§ 4594; Id., § 8d; affidavit of one of intemperate habits, and use other than stated in affidavit—§ 4597; Id., § 12; manufacturers of alcohol—§ 4600; Id., § 14, as amended by Acts 1920, p. 806; hospitals, chemical laboratories—§§ 4601-2; Id., § 14; shipment to druggists—§ 4605 as amended by Acts 1920, p. 83; Id., § 15; clubs, lodges, etc.—§ 4606; Id., § 16; advertisements—§ 4609; Id., § 19; handling drafts for, prohibited—§ 4610; Id., § 20; agents of common carriers—§ 4611; Id., § 21; stills—§ 4611a; Id., § 21½, as amended by Acts 1922; § 4611b, as amended by Acts 1920, p. 585; Attorney General, deputies and inspectors—§§ 4623-5a, as amended by Acts 1920, pp. 121, 571, and §§ 4627-9; Id., §§ 32, 32½, 35 and Acts 1922; transportation of malted milk, etc.—§ 4630b; Id., § 36b; common carriers—§§ 4632, 4634, 4637, 4637a, 4638a; Id.,

§§, 38, 39, 39½, 40, 40a; associate counsel in prosecutions—§ 4644; Id., § 44; right of appeal by Commonwealth—§ 4645; Id. § 45; duties of attorney for Commonwealth—§ 4647; Id., § 47; prescriptions, affidavits, and record books examined—§ 4648; § 4654, as amended by Acts 1920, p. 593; Id., §§ 48, 54; forfeited bonds—§ 4655d; Id., § 55d; clerk to report to commissioner—§ 4655e; Id., § 55e; permits—§ 4662a; Id., § 62; what persons may administer oaths—§ 4667; Id., § 66; stamps to be affixed to affidavits and prescriptions—§ 4668; Id., § 67.

II. NATIONAL PROHIBITION

§ 75. Constitutional provision—"18th Amendment".—This amendment to the U. S. Constitution provides:

"1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

2. The Congress and several States shall have concurrent power to enforce this article by appropriate legislation."

This amendment was ratified by the States, January 16, 1919; and October 27, 1919, Congress passed a general prohibition enforcement act, entitled the "National Prohibition Act," being "An act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries." This act went into effect January 16, 1920. The act has three titles: I. "To Provide for the Enforcement of War Prohibition"; II. "Prohibition of Intoxicating Beverages"; and III. "Industrial Alcohol."

It would seem obligatory upon all the States to pass prohibition enforcement laws to carry out the intent of this 18th Amendment. Article VI. of the U. S. Constitution provides that the Federal Constitution and laws are supreme, "anything in the Constitution or laws of any State to the contrary notwithstanding." Therefore it would not be competent or constitutional, under the 18th Amendment; for a State to authorize the manufacture, sale, or use of intoxicating liquors for beverage purposes.

Virginia and the following States, have passed prohibition enforcement acts:

Alabama, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wyoming.

The following States have not, as yet, passed such act:

Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Wisconsin, California, Louisiana, Kentucky and Vermont.

§ 76. "National Prohibition Act".—

(1) *What "intoxicating liquors" embrace.*—The act includes "alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe." (Act, Title II., § 2.)

(2) *What acts prohibited.*—The manufacture, sale, barter, transportation, importation, delivery, furnishing or possessing any intoxicating liquor except as authorized in the Act; and the Act is to be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquors for non-beverage purposes and wine for sacramental purposes are not included, and permits may be issued therefor; nor the following articles:

"(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

(d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

(e) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

(f) Vinegar and preserved sweet cider." (Act, Title II., §§ 3, 4.)

The Act does not apply to the manufacture of non-intoxicating cider and fruit juices exclusively for use in the person's home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar. (Act, Title II., § 29.)

(3) *Punishment.*—For manufacture or sale, for the first offense a fine not over \$1,000, or imprisonment not over 6 months, and for the second or subsequent offense a fine of \$200 to \$2,000 and imprisonment one to five years. (Act, Title II., § 29.)

(4) *Officers for enforcement of Act.*—They are the commissioner of Internal Revenue, his assistants, agents, and inspectors, U. S. Attorney General, District Attorneys, judges, and commissioners. The Commissioner of Internal Revenue and the Attorney General are authorized to appoint and employ such assistants, experts, clerks, and other employees as may be necessary. A Federal Prohibition Commissioner is appointed to have general charge of the enforcement of the Act. (Act, Title II., 2, 38.)

(5) *Other provisions.*—The Act in general is similar to the Virginia Act, covering 20 pages. For a copy write to the Prohibition Commissioner or Attorney General.

JAILOR

- § 1. Who is jailor
- § 2. His duties
- § 3. Jailor's liability for escapes

§ 1. Who is jailor.—The sheriff or sergeant is in law, ex-officio (by virtue of his office) the jailor (Code, § 2868), and is responsible civilly, but not criminally (unless he concurred in the act), for the official conduct of his deputy acting for him as jailor.

§ 2. His duties.—See Code, § 2857 (as to comfort and health of prisoners); § 2858 (as to communicating with prisoners); §§ 2860-1, 2871 (as to records of prisoners kept by jailors, and deduction or addition of time); § 2869 (jailor to attend court and obey its orders); § 2870 (report of number of prisoners); § 2871 (report to State Board of Charities and Corrections); § 2872, as amended by Acts 1922, and § 2873 adopting jail of another county); § 2874 (duty of jailor of adopted jail); §§ 2875-6 (duty and pay as to U. S. prisoners); §§ 2877-9 (as to pay for persons confined under civil process); § 2880 (turning prisoners over to successor).

§ 3. Jailor's liability for escapes.—The sheriff as jailor, in the absence of a statute to the contrary, is civilly liable, at common law, for the escape of any prisoner confined on civil process, unless it occur by "act of God" (as earthquake, fire, tornado, etc.), or of a public enemy.

The jailor himself is criminally liable where he voluntarily suffers to escape a prisoner convicted or charged with a felony, and is punishable by penitentiary 2 to 10 years; for all negligent escapes, and for voluntary escapes, where the offense is only a misdemeanor, or if he wilfully refuse to receive a person lawfully committed to his custody, he is punished by jail not over six months or fine \$50 to \$500.

§ 4. Fees of a jailor.—See Code, § 3510, as amended by Acts 1920, p. 529.

JAMES RIVER

§ 1. **Failure to sound steam whistle on.**—Fine \$50 to \$200. (Code, § 4755.)

§ 2. **Fish and oysters in.**—See *Fisheries, and Oysters and Other Shell Fish*.

JUDGMENT LIEN

- § 1. "Judgment" includes "decree" or "order"
- § 2. What property subject to lien
- § 3. Commencement of judgment lien
- § 4. Duration of judgment lien
- § 5. Merger or waiver of judgment lien
- § 6. Enforcement of judgment lien
- § 7. Docketing judgments; their priority
 - (1) Docketing
 - (2) Priority
- § 8. Assignment of judgments
- § 9. Where land subject to lien is conveyed
 - (1) Conveyance or will of successive parcels
 - (2) Several conveyances at same time
- § 10. Substitution of sureties to the judgment lien
- § 11. Satisfaction or discharge of judgment lien

§ 1. **"Judgment" includes "decree" or "order".**—Code, §§ 6459-60.

§ 2. **What property subject to lien.**—Only real estate (Code, § 6470)—see, also, *Real Estate*, section 1. This includes an equity of redemption (see *Mortgage*, section 2); or the surplus of a sale under a deed of trust; or a contingent remainder or reversion, to be subject only after it becomes vested (see *Remainder and Reversion*; also Code, § 6389); or land bought by a father (indebted), which is conveyed to a son (6 Grat. 119, 125); or vendee's equitable interest, where land, purchased by one, is directed to be conveyed to him who has bought it from the purchaser (102 Va. 547); and generally beneficial or equitable interests in (not merely liens on land, though the legal title is in another, as, in the case of trusts, express or implied (resulting and constructive trusts)—see *Trusts and Trustees*, sections 1, 3, 4; but not

where the debtor has no beneficial interest, as, where he is only trustee, or where land is conveyed to a judgment debtor and as a part of the same transaction he re-conveys it by deed of trust to secure the purchase money, in this latter case only the surplus left being liable to the judgment (102 Va. 547; 86 Va. 547). (1 M's Real Prop., § 698.)

§ 3. Commencement of judgment lien.—A judgment, other than a judgment by confession in vacation, is a lien on all the real estate of or to which the judgment debtor is or becomes possessed or entitled, at or after the date of such judgment, or if it was rendered in court, at or after the commencement of the term at which rendered, if the case was in such condition that a judgment might have been rendered on the first day of the term, but if from the nature of the case the judgment could not have been rendered at the commencement of the term, such judgment shall be a lien only on or after the date of the judgment; but the above is not to prevent a judgment lien from relating back to the first day of the term merely because the case is set for trial or hearing on a later day of the term, if such case was matured and ready for hearing at the commencement of the term, nor merely because an office judgment in a case matured and docketed at the commencement of the term does not become final until a later day of the term. (Code, § 6470.)

As to judgments by confession in vacation, by the same section (§ 6470) such judgment is a lien on such real estate, only from the time of day at which such judgment is confessed; and if there be more than one confessed judgment by the same defendant, they have priority in the order in which confessed, unless otherwise directed by the debtor. As to office judgments, by section 6134 a judgment entered in the clerk's office, where there is no order for an inquiry of damages, if not previously set aside, becomes final, if in a circuit court, on the adjournment of the next term or at the close of the 15th day thereof (whichever happens first); but if in the circuit court of Richmond, or the law and chancery (or equity) court of Richmond, Norfolk, or Roanoke, and the cases be matured at rules and docketed during the term, the judgment becomes final on the adjournment of the term; and if the case be in a corporation court, it becomes final on the

adjournment of the next term designated for the trial of civil cases in which juries are required, or at the close of the 15th day thereof (whichever happens first). Such office judgments have the same effect by way of lien or otherwise, as a judgment rendered in term.

A judgment against an administrator or executor of a deceased debtor is not a lien upon the land in the hands of his heir, for at the date of the judgment the land was not owned by the debtor (95 Va. 145).

§ 4. Duration of judgment lien.—A judgment and its lien remain in force as long as the right to issue an execution or to bring a *scire facias* or action for its revival exists. (Code, § 6474, as amended by Acts 1922.)

An execution may issue within a year, or the judgment revised within 10 years from its date and where an execution issues within the year other executions may be issued or the judgment revised within 10 years from the return day of an execution on which there is no return by an officer, or within 20 years from the return day where there is a return by the officer showing it has not been satisfied, and then the judgment is just as alive and subject to revival and prolongation as it was in the start. Where the revival is against an administrator or executor it must be within 5 years from his qualification. Also, as against a grantee of the judgment debtor for value, the judgment (including also one in favor of the Commonwealth) cannot be enforced after 10 years from the due recordation of the deed. In computing the above time, where the suing out of an execution is suspended by its terms or by legal process, that time is omitted; and the exceptions as to persons under disability, or dead, or where suit is prevented by the debtor by his absence, concealment, or obstruction, or where the suit abates or is defeated on grounds not affecting the right to recover, as contained in sections 5823-6 of the Code, also applies to revival of judgments. When the judgment is for a penalty of a bond, but to be discharged by what is then ascertained to be due and such sums as may be afterwards assessed or found due upon a *scire facias* on the judgment, assigning a further breach of the bond, such *scire facias* may be brought within 10 years after such breach. (Code, §§ 6477-8.)

For effect of change of parties by death, see *Execution*, section 18.

The above provisions as to judgments, also applies to recognizances and bonds having the force of a judgment (Code, § 6479).

§ 5. Merger or waiver of judgment lien.—The lien of a judgment is not impaired by the recovery of another thereon, or by a forthcoming bond taken or an execution thereon, such bond having the force of a judgment (Code, § 6475). The lien may be, of course, expressly released or waived (see section 11, below); or impliedly waived, if the circumstances are such as to show that intention. In the absence of agreement or intention to that effect, equity will not usually regard the lien as merged, even where the judgment creditor obtains the legal title to the land, if there is any need to keep it alive for his benefit, as, where there is another encumbrance to which the judgment lien, if kept alive, would be superior. (1 M's Real Prop., § 698.)

§ 6. Enforcement of judgment lien.—Aside from executions (see *Execution*), a judgment lien against land is enforced in equity by selling the land or a part thereof, if it appears to the court that the rents and profits thereof will not satisfy the judgment in five years (Code, § 6471). But where the amount of the judgment does not exceed \$20, exclusive of interest and costs, 30 days' notice must first be given to the debtor and land-owner (or his agent or attorney, if he have one, in case of non-residence) that the suit will be brought, if the debt is not paid within that time (Code, § 6473).

No decree of sale should be made until an account of liens and their priorities has been taken; but if the creditor also has a vendor's lien, no such account is required to be taken.

The judgment being a legal lien created by statute, the rules of courts of equity, such as, he who asks equity must do equity, has no application, and the lien may be enforced without terms or conditions imposed. (1 M's Real Prop., § 699.)

Such suits of course are barred, as to any judgment heretofore or hereafter rendered, when the duration of the judgment lien has ceased—see section 4, above; “nor shall any suit

be brought to enforce the lien of any judgment heretofore or hereafter rendered against lands which have been conveyed by the judgment debtor to a grantee for value, unless the same be brought within ten years from the due recordation of the deed from such judgment debtor to such grantee. This section so far as it affects such grantees for value or those claiming under them, shall apply as well to judgments in favor of the Commonwealth as to other judgments." (Code, § 6474,) as amended by Acts 1922.)

§ 7. Docketing judgments; their priority.—

1. *Docketing.*—The clerks are required to keep a Judgment Docket, in which all judgments (including U. S. judgments) and abstracts of judgments furnished them are required to be docketed and indexed, and payments or satisfaction entered by him, or by the creditor. (Code, §§ 6461-8, 6025.)

2. *Priority.*—By section 6471 of the Code: "No judgment shall be a lien on real estate as against a subsequent purchaser thereof for valuable consideration without notice, until and except from the time that it is duly docketed in the proper clerk's office of the county or corporation wherein such real estate may be," and indexed (Code, § 6464).

Docketing is not necessary as against the parties, grantees by gift, purchasers with notice, or other creditors (lien or general); creditors, however, secured by deed or trust or mortgage, are in law purchasers and not creditors.

The priority of judgment creditors as among themselves is in the order of the dates of their respective judgments, regardless of recordation (see Code, § 6470).

§ 8. Assignment of judgments.—A judgment, as a chose (or thing or right) in action, may be assigned like a note, bond, etc.; and in case of several judgments against one defendant, successively assigned to different persons, the assignees take priority in the order of the dates of the judgments. (Code, §§ 5786, 6470.)

§ 9. Where land subject to lien is conveyed.—

(1) *Conveyance or will of successive parcels.*—Any part retained by the debtor is first liable; as among the several grantees for value, that which was conveyed last is first liable, and so on with the others until the whole judgment is satisfied;

and the same is true as among grantees, etc., without valuable consideration (as by gift or under a will); but as among grantees for value and grantees, etc., without value, the land of the latter is taken before that of the former; and a grantee for value from a grantee, etc., without value occupies the same position as if he had purchased from the debtor at that time. (Code, § 6476.)

The above covers also contracts to convey, which in equity are considered the same as conveyances (33 Grat. 506; 19 Grat. 366, 388).

As the purchasers are of different tracts (not of the same land), there are no subsequent purchasers, and the registry laws do not apply (33 Grat. 506).

The date named in the assignment is *prima facie* the date (1 Rand. 219, 241).

Where there are thus several conveyances, as above, the court will direct an account showing the priorities, before decreeing a sale (101 Va. 64).

(2) *Several conveyances at same time.*—Here also, any part retained by the debtor is first liable. The land is then subjected ratably, in proportion to the value of each parcel, which the court fixes as of the date of sale, and upon failure of any one to pay, his part is sold; and if, in any case, the land fails to satisfy his share, the deficiency is apportioned among the others and so on until the judgment is satisfied, or all the lands sold (19 Grat. 366, 388; 33 Grat. 504; 28 Grat. 815, 825; 31 Grat. 620).

§ 10. Substitution of sureties to the judgment lien.—A surety paying the debt may be subrogated (i. e., substituted) to the benefit of the lien; but by section 6475 of the Code, he must bring suit within 5 years after his right accrued.

§ 11. Satisfaction or discharge of judgment lien.—Where a return of an execution shows satisfaction in whole or in part, the fact is entered in the Judgment Docket book; if there be no such return, then the creditor himself, or his agent or attorney is to cause such payment or satisfaction, in whole or part, to be entered within 90 days; or if the judgment has not been docketed, in the Execution Book. Such entry must be signed by the creditor or his agent or attorney and attested by the clerk. Furthermore, provision is made for per-

mitting a judgment debtor, his heirs, administrator, or executor (but not assignee), upon motion after 10 days' notice to the creditor, his administrator, executor, or assignee, or if he be a non-resident, to his attorney, if he have one, to apply to the court to have the same marked; and if the creditor be a non-resident and have no attorney here, the notice must be published and posted as an order of publication. Upon like motion and similar proceedings the court may order to be marked "discharged in bankruptcy", any judgment shown to have been so discharged. (Code, §§ 6465-7.)

JUDICIAL SALE

See Auction and Auctioneers; Caveat Emptor; Judgment Lien; Special Commissioner

- § 1. Definition
- § 2. Account of liens must be taken before sale
- § 3. Injury as to rents and profits before sale
- § 4. Judicial sale not within the statute of frauds
- § 5. Purchaser cannot, before confirmation, sell at advance price
- § 6. When confirmation of sale refused for inadequacy of price
- § 7. When upset bid allowed
- § 8. Purchaser compelled by rule to comply
- § 9. When set aside after confirmation
- § 10. Other statutory provisions

§ 1. Definition.—A judicial sale is one made under or by authority of a decree of court.

§ 2. Account of liens must be taken before sale.—The amounts and priorities of liens must be taken before decreeing a sale of land, and it is error to sell without, if the objection is made in the court below. (79 Va. 220, 551; 85 Va. 198; 86 Va. 67, 754, 760; 90 Va. 762; 92 Va. 383.) This account of liens must also embrace delinquent taxes. (Code, § 6267.)

§ 3. Inquiry as to rents and profits before sale.—Before decreeing a sale, there must first be an inquiry, also, as to whether the rents and profits will pay the liens within five years (Code, § 6472), unless it be alleged and not denied that

the same would not be sufficient. (77 Va. 57; 78 Va. 406; 90 Va. 762, 766.)

§ 4. Judicial sale not within the statute of frauds.—A judicial sale is binding on the purchaser, without any written contract or memorandum signed by him or his agent, as is required under the statute of frauds (Code, § 5561). (94 Va. 250.)

§ 5. Purchaser cannot, before confirmation, sell at advance price.—The court will not, in such case, confirm the sale, such practice tending to prevent property bringing the best price. (96 Va. 521.)

§ 6. When confirmation of sale refused for inadequacy of price.—This will be done where the inadequacy is so gross as to amount to sacrifice of the property. (83 Va. 525; 84 Va. 586, 591; 86 Va. 679, 680; 88 Va. 328; 89 Va. 836.)

§ 7. When upset bid allowed.—While allowing an upset bid lies in the sound legal discretion of the court under all the circumstances, yet ordinarily a sale will be set aside and the biddings reopened at any time before confirmation upon the offer of a substantial upset bid, say 10 per cent. on small sums or even 5 per cent. on large sums. (83 Va. 525; 84 Va. 586, 589-91, 597; 85 Va. 299; 96 Va. 603.) But biddings will not be opened where upset price is offered through prejudice against the purchaser. (32 Grat. 454.) Usually one present at the sale and bidding or having an opportunity to bid, will not be allowed to put in an upset bid. (96 Va. 603.)

§ 8. Purchaser compelled by rule to comply.—A purchaser failing to comply with the terms of the sale or to complete his purchase, may be compelled to do so by rule. (15 Grat. 288; 2 P. & H. 488; 75 Va. 341; 76 Va. 254; 80 Va. 82; 85 Va. 857-9; 87 Va. 676; 94 Va. 250.) For statutory procedure by rule, see Code, §§ 6274-7.

§ 9. When sale set aside after confirmation.—A sale will be set aside after confirmation for fraud, accident surprise, mistake, or some other special matter which would justify setting aside a private sale. (89 Va. 836; 77 Va. 135.)

By statute (§ 6306), the title of the purchaser, after 12 months from confirmation, cannot be affected (77 Va. 775; 21 Grat. 378).

§ 10. Other statutory provisions.—As to decrees of

sale, receivers, orders for executing deeds, reservation for infants, application of purchase money, etc., see Code, §§ 6266-97, and Acts 1922, amending § 6270.

JURIES

(See "Burks' Pleading & Practice" (new ed.), same title.)
See *Criminal Law and Procedure; Trials*

§ 1. **In civil cases.**—For chapter as to, see Code, §§ 5984-6014, and Acts 1918, p. 466, amending § 6007, and Acts 1920, pp. 3 and 595, amending §§ 5986-90, and Acts 1922, amending §§ 5985, 5995.

§ 2. **In criminal cases.**—As to felonies, see Code (under "Trial and Its Incidents"), §§ 4895-4904, 4927-8, and Acts 1920, p. 24, amending § 4895 (as to *venire facias* in case of felony). See also, *Criminal Law and Procedure*, section 13, (4), (e). As to misdemeanors, see Code, § 4927, which makes (with a few exceptions) the chapter above as to "Juries in Civil Cases" applicable to misdemeanor cases. See, also, *Criminal Law and Procedure*, section 13, (4), (g).

The jury summoned in felony cases, may be used for misdemeanor cases also. (Code, § 4895, as amended by Acts 1920, p. 24.)

JURORS (OFFENSES CONCERNING)

See *Bribery and Obstruction of Justice*

§ 1. **Officer summoning juror to act partially.**—Punishment, fine not over \$500 and forfeiture of office, and perpetual disqualification to hold office. (Code, § 4519.)

§ 2. **Any one corruptly procuring juror to be summoned.**—Punishment, fine not over \$500. (Code, § 4520.)

JUSTICE OF THE PEACE

See Justices in Cities and Towns

In each magisterial district there are elected three (more, if the court thinks proper) justices of the peace, on Tuesday after the first Monday in November, every fourth year after 1919, for four years; and he qualifies by taking the oaths prescribed by law, no bond being required. (Code, §§ 127-8.) And it should be observed that accepting or holding the office of clerk of a court, sheriff, sergeant, coroner, or constable, or deputy of either, vacates the office of justice (Code, § 3093). Provision is made, upon approval of the board of supervisors, for the appointment of a trial justice in counties adjoining one or more cities having a population of 100,000 or more in the aggregate—see Acts 1922, p.—.

The general jurisdiction, powers, and duties of a justice, will be presented under the following Roman divisions: I. Warrants for Small Claims; II. Attachments; III. Unlawful Detainer before a Justice; IV. Distress Warrant; V. Arrest, Commitment, and Bail; VI. Trial of Misdemeanors before a Justice; VII. Recovery of Fines before a Justice; VIII. Peace and Good Behavior; IX. Search Warrants; X. Costs before a Justice. Various other duties are given under the respective headings.

I. WARRANTS FOR SMALL CLAIMS

- § 1. Of what a justice to have jurisdiction
 - (1) "To specific personal property"
 - (2) "To any debt, fine, or other money"
 - (3) "To damages for breach of any contract"
 - (4) "To damages for injury to property, real or personal"
- § 2. Other statutory provisions
- § 3. Other matter as to warrants for small claims
 - (1) Form of the warrant
 - (2) Collateral proceedings on warrant in detinue
 - (3) Who may sue and be sued
 - (4) Within what time warrant must be brought
 - (5) When and how warrant may be served
 - (6) Grounds for continuance
 - (7) Witnesses and evidence
 - (8) Set-offs and other defenses
 - (9) Warrant against several defendants
 - (10) Judgment when instrument waives homestead
 - (11) Lien of judgment

- (12) General principles governing motion for new trial
 - (a) After-discovered evidence
 - (b) Accident, surprise, or fraud
 - (c) Mistake as to law
 - (d) Number of new trials
 - (e) When and by whom new trial awarded
- (13) Appeals
- (14) Execution
 - (a) Motion to quash an execution
 - (b) Garnishment proceedings on an execution
 - (c) What execution may be levied on; lien thereof
 - (d) Homestead exemption
 - (e) Poor man's exemption
 - (f) When and how execution levied
 - (g) Indemnifying and suspending bonds
 - (h) Safe-keeping and sale of property levied on
 - (i) Officer's return upon an execution
 - (j) Officer fined for failure to return execution; motion before and judgment by justice against officer and sureties for amount of execution
 - (k) Officer and sureties liable for money collected after, as well as before, return day of execution; also for moneys received for claims; when receipt therefor, evidence of collection
 - (l) Proceeding before a justice to try the title to property levied on under distress warrant or execution from justice; when and how allowed

§ 4. Various forms under "Warrants for Small Claims"

§ 1. **Of what a justice to have jurisdiction.**—Section 6015 of the Code says: "Any claim to specific personal property, or to any debt, fine, or other money, or to damages for breach of any contract, or for any injury done to property, real and personal, which would be recoverable by action at law or suit in equity, shall, when the claim is to a fine, if the amount of such claim does not exceed \$20, and in all other cases, if the claim do not exceed \$300 (exclusive of interest), be cognizable by a justice, even though the claim be for or against the city, town, or county in which such justice resides. Justices shall also have jurisdiction of actions of unlawful entry or detainer in cases provided by section 5445" (see div. III., below).

The class of civil injuries embraced by this our present statute are indeed numerous, embracing any claim, legal or equitable:

- (1) "*To specific personal property.*"—This embraces all

kinds of personal property that are susceptible of identification, whether horses, furniture, watches, rings, bonds, pieces of coin, or the like.

(2) "*To any debt, fine, or other money.*"—Debt or other money covers cases where money is due by certain agreement, expressed or implied, whereby the amount to be paid is certain, or, at least, ascertainable from facts at hand—i. e., in cases of a bond, promissory note, lease, goods sold, work done, money paid, laid out and expended, lent and advanced, or had and received, to another's use, or a promise to pay a named sum in chattels, as \$300 in wheat, and default is made, and the like instances.

Where the proceeding is for a debt due by a penal bond, the principal sum due (Code, § 6374), and not the penalty, is the amount in controversy, though otherwise at common law.

When the original amount exclusive of the interest exceeds \$300, and has been reduced by payments or by set-offs—i. e., counter demands in the nature of debts, on the part of the defendant—a justice has jurisdiction.

It is now settled law that when the entire claim exceeds \$300, and has been divided into several parts, each not exceeding \$300, and separate securities are taken therefor, and all are due, a justice has no jurisdiction, for the courts of record cannot thus be deprived of their jurisdiction, nor the defendant of his right to trial by jury, and a writ of prohibition will be awarded by the circuit court in order to prevent the usurpation. So, also, the writ will be awarded, if a justice in any case usurp an illegal jurisdiction, as by taking cognizance of controversy involving the title to a freehold, or by otherwise transcending his lawful cognizance.

It is probably likewise inadmissible to enter a fictitious credit in order to reduce the amount to \$100 or less, being *in fraudem in legis*,—depriving the courts of record of their lawful jurisdiction and the defendant of his right to a trial by a jury; but a person may, unquestionably, warrant for such damages, not exceeding \$300, as he may choose to claim, the above principles not applying hereto. (1 Va. Cas. 131, 158; 2 Va. Cas; 95, 255; 77 Va. 225; 12 Grat. 17; 15 Grat. 528; 16 Grat. 220; 20 Grat 10, 23; 29 Grat. 706-7; 713; H's G. & M. pp. 748-9.)

The justice should note that the law (Code, § 5561) prohibits the bringing of a warrant in certain cases, unless the promise, contract, agreement, or some memorandum thereof be in writing and signed by the party to be changed thereby or his agent, thus:

(1) To charge any person upon a promise made, after full age, to pay a debt contracted during infancy, or upon ratification, after full age, of a promise or simple contract made during infancy;

(2) To charge a personal representative upon a promise to answer any debt or damages out of his estate;

(3) To charge any person upon a promise to answer for the debt, default, or misdoings of another;

(4) Upon any agreement made upon consideration of marriage;

(5) Upon any contract for the sale of real estate or for the lease thereof for more than a year; or,

(6) Upon any agreement that is not to be performed within a year.

A fine is any pecuniary forfeiture, penalty, or amercement, imposed as the punishment for the violation of some law. (Code, § 2577.)

(3) "*To damages for breach of any contract.*"—A contract is defined to be a mutual agreement between two or more competent parties for valuable consideration touching a lawful subject-matter. Thus:

(1) There must be mutual assent, the parties agreeing to the same thing at the same time.

(2) There must be competent parties. All persons are competent to contract, with few exceptions. Thus, infants and persons *non compos mentis*, whether from idiocy, lunacy, or drunkenness, cannot, in general, make a valid contract. The contract of persons under duress, by violence or threat, are likewise void; so, also, of persons wanting in competent ownership of the subject-matter of the contract. Married women are now empowered to contract, as if single (Code, § 5134).

(3) There must be a legal subject-matter.

(4) There must be valuable consideration, which the law defines to be a benefit to the party promising or to a

third person at his request, or an inconvenience, loss or injury, or the risk of it, to the other party; and the amount thereof, so it is appreciable, is immaterial, save only that, if grossly inadequate, it may tend to prove a fraud.

Damages for breach of a contract in writing, under seal or not, are less difficult for the justice to ascertain than in cases where the contract is not in writing and must be proved, or where the damages are claimed on an implied contract, arising from reason and construction of law—e. g., to pay for goods sold, work done, and the like, when there is no express promise. But where there is some sufficient reason for service, other than the expectation of wages—e. g., when rendered for a near relative, to whom it is due as a debt of affection, or in anticipation of a legacy, or the like—a promise to pay will not be implied from the mere voluntary acceptance of the service. See, also, *Contracts*.

(4) "*To damages for injury to property, real or personal.*"—Injuries to personal property may be inflicted in various ways, as by shooting one's dog, killing his cattle, or in anywise making his property less valuable. These injuries may result directly or indirectly from the force applied by the wrong-doer, and in either case the party aggrieved may recover damages equal to the loss thereby sustained. And it is not material whether the injury be inflicted by the defendant himself, or by his servant under his direction, either being responsible. And if a man keeps a dog or other brute animal, used to do mischief, as by worrying sheep or the like, the owner must answer for the consequences, if he knows of such evil habit. Also, if a man sets traps on his own grounds, but baited with such strong-scented articles as to allure the neighboring dogs, the owner of a dog injured thereby may warrant therefor. For when a railroad company is liable for injuries to property on its track, see *Railroads and Railroad Companies*.

Injury to real property may be inflicted in a number of ways; (1) By trespassing on another's land without lawful authority, and doing some damage thereto, however little, as, the mere treading down the grass, and it matters not whether the defendant himself did it, or his servant by his direction, or his cattle; (2) by a nuisance, every day and every

hour of continuance whereof constituting a new cause of action; (3) by committing waste thereon, which may be merely permissive or negligent, as suffering a house to fall or to be injured for want of repairs and the like, or voluntary, as pulling down, altering, or injuring another's house, cutting his timber, changing the course of his husbandry, opening mines, removing things fixed to the freehold, selling or removing manure, and the like; or (4) by disturbance, in respect to one's ferry, toll bridge, turnpike, mill, private right of way, lease of lands, or the like. Many of these acts are also made criminal—see *Trespass; Nuisance*. By statute (Code, § 5785) any person injured by the violation of a statute may, unless otherwise expressly provided, recover damages therefor, even though the statute prescribes a penalty or forfeiture; and both damages and penalty may be recovered in the same warrant or action, if the same person is entitled to both.

§ 2. Other statutory provisions.—

(1) *Procedure when plaintiff swears to his claim.*—By section 6016 of the Code: "If the warrant be upon an account or contract express or implied for the payment of money, affidavits may be made and like proceedings had as is provided by section 6133, in an action of assumpsit."

(2) *Removal to court.*—By section 6017: "In every case cognizable by a justice where the amount or thing in controversy exceeds the sum or value of \$50, the justice shall, at any time before trial, upon the application of the defendant, and upon the payment by him of the costs accrued and writ tax, remove the case, and all the papers thereof, to the circuit court of the county or to the corporation court of the city wherein the warrant has been brought and transmit to the clerk the writ tax received by him, and the clerk of the said court shall forthwith docket the case. On the trial of the case the proceedings shall conform to proceedings under section 6046" (see *Motions for Money*).

(3) *Trial in court; defective or irregular warrants.*—By section 6018: "Appeals under section 6027 from justices and warrants removed under the preceding section shall be tried according to the principles of law and equity, and where the same conflict the principles of equity shall prevail. No

warrant shall be dismissed by reason of the mere defects, irregularities, or omissions in the proceedings before the justice, or in respect to the form of the warrant, where the same may be corrected by a proper order of the court; but the court to which the appeal is taken, or the warrant removed, shall retain the same, with full power to direct all necessary amendments, to enter such orders and direct such proceedings as will tend to correct the defects, irregularities, and omissions aforesaid, to promote substantial justice to all parties, and to bring about a trial of the merits of the controversy. This statute shall be liberally construed, to the end that justice be not delayed or denied by reason of errors in the warrant or in the form of the proceedings; and the court may make such provision as to costs and continuances as may be just."

(4) *In what cases justices of the peace shall not have jurisdiction in a suit or warrant.*—By section 6019: "If a justice of the peace be a party to a suit or warrant, or be interested in the result thereof, otherwise than as a resident or taxpayer of the district or county, or be related to either of the parties as grandfather, father, father-in-law, son, son-in-law, brother, brother-in-law, nephew, uncle, first cousin, guardian, or ward, or be a material witness for either party, or who has such claim in his hands for collection for compensation, he shall not take cognizance thereof, unless all parties to the suit consent thereto in writing. To any judgment entered by a justice in such case, without such consent, an appeal may be taken regardless of amount in controversy as other appeals are taken, and such judgment shall be annulled and set aside; but unless an appeal is thus taken the judgment shall be valid and binding. But when a justice is under such disabilities, any other justice in the same district may exercise jurisdiction in the case, or if there be no other disinterested justice in the same district, then any other justice in the same county may exercise jurisdiction, if there be no other objection. Nothing in this section shall be construed as permitting or authorizing justices of the peace to receive claims or evidences of debt for collection."

(5) *How warrant issued, directed, and returnable; where executed; how served on corporation.*—By section 6020: "A justice, when applied to by any person, shall issue a warrant

directed to a constable or the sheriff or sergeant of the county or corporation wherein the defendant resides, together with a copy thereof, requiring him to summon the person against whom the claim is to appear before him or some other justice on a certain day, not exceeding thirty days from the date thereof, to answer such claim. It shall be made returnable to some place within the magisterial district in which the defendant, or, if there be more than one, either defendant resides, unless the justice, for good cause, direct it to be returned to some other place within his county or corporation. If a public service corporation be defendant, the warrant may be issued and tried in the county or corporation in which the cause of action or any part thereof arose. The warrant may be executed in any part of the county or corporation. The warrant shall be served as provided for in section 6041 and 6063-4,"—see *Notice and Corporations*, section 12, (2).

(6) *How witnesses summoned and compelled to attend.*—By section 6021: "Subpoenas for witnesses may be issued by a justice directed to a constable, sheriff, or sergeant of any county or corporation. Any person summoned to attend as a witness before a justice who shall fail so to attend shall, unless he show a reasonable excuse therefor within ten days after being summoned to state such excuse, be fined by the justice before whom the failure occurred a sum not exceeding \$5 for the use of the party on whose behalf he was summoned."

(7) *How and when warrant tried and judgment given; when justice shall associate with himself other justices.*—By section 6022: "The justice shall try such warrant according to the principles of law and equity, and give judgment for the sum due to either party, with interest, or for the property to which the plaintiff is entitled (or its value), with damages. Costs shall be awarded or refused to either party on like principles. In the trial of all warrants, both civil and criminal, upon application of the defendant, at any time before trial, to the justice of the peace, who issued said warrant and before whom it is returnable, such justice shall associate with himself two other justices of the peace of the county, who shall try said warrant, and in case of disagreement in opinion, the opinion of the majority shall prevail; but no such trial of any civil warrant shall be had within five days after the service of the warrant, except with the consent of the parties."

(8) *Judgment to be endorsed on papers.*—By section 6023: "The justice rendering any such judgment shall endorse on the face of the writing, account, or other paper, on which the warrant issued, or on any writing, account, or other paper, allowed as a set off, the date and amount of the judgment and costs, and affix his name thereto."

(9) *Justice's record book; what to be entered therein; when delivered to clerk.*—By section 6024: "He shall also, in a book kept for the purpose, enter the date of the judgment, the name of the person for, and of the person against, whom it is, and its amount; also the date of any execution issued thereon, and to whom delivered. If he fail to do so, he shall forfeit \$20. The cost of said book shall be chargeable on the county or corporation. When the said book is completed, or in case of a vacancy in his office by death, resignation, removal, or otherwise, it shall be delivered to the clerk of the circuit court of his county or the corporation court of his city by the justice, if alive, and by his personal representative, if he be dead, to be kept by said clerk among the records of his office, if it be completed, but otherwise to be delivered to his successor in office."

(10) *Justice to deliver abstract of judgment.*—By section 6025: "The justice rendering any such judgment shall certify and deliver an abstract thereof at any time during his continuance in office to any person interested therein who may desire to have the same docketed; but if the justice rendering said judgment be absent from his county or corporation or his office be vacant such abstract of judgment may be made and certified by his successor in office or any other justice of the county or corporation."

(11) *When and by whom new trial awarded.*—By section 6026: "After thirty days from any such judgment, no new trial shall be granted in the case, nor shall it be granted within the thirty days unless the opposite party be present at the time of the application, or unless after five days' notice to him (if in the county or corporation) of the time and place of the application for such new trial. The justice, who rendered the judgment, shall alone have power to grant such new trial, while he is in office; if he die, resign, be absent from the county, or be removed, it may be granted by another jus-

tice. If the warrant be tried by three justices under section 6022, a new trial may be granted by any two of them while in office."

(12) *How appeal allowed or execution stayed.*—By section 6027: "If the judgment be for a sum exceeding \$10 the justice may stay execution on it sixty days from its date on such security being given for its payment as he may deem sufficient. From any such judgment the justice rendering it may, within ten days, on such security being given as he approves for the payment of such judgment as may be rendered on appeal by the appellate court against the defendant and all costs and damages, allow an appeal where the case involves the constitutionality or validity of a statute of this State or of an ordinance or by-law of a corporation, or where the matter in controversy exclusive of interest is of greater amount or value than \$10. Where the appeal is by a party against whom there is no recovery except for costs the security shall be for such costs and damages as may be awarded against him on the appeal if the judgment of the justice be affirmed. The verbal acknowledgment of any surety taken under this section shall be sufficient, and the endorsement by the justice of the name of the surety upon the warrant on which the judgment is rendered shall be conclusive evidence of such acknowledgment. The court in which the appeal is cognizable may be on motion for good cause shown require the appellant to give new or additional security, reasonable notice of such motion having been given to said appellant, and if he fail to give such security the appeal shall be dismissed with costs, and the court shall award execution on the judgment rendered by the justice, with costs against the appellant and his surety."

(13) *When and by whom writ tax to be paid in cases appealed from justices of the peace or civil justices.*—By section 6028: "When an appeal is taken from the judgment of a justice of the peace or a civil justice the party taking such appeal shall, within thirty days from the date of such appeal, pay to the clerk of the court to which such appeal has been taken the amount of the writ tax as fixed by law, and in event of his failure to do so, the appeal shall stand dismissed, and the judgment of the justice of the peace or civil justice

affirmed, and the original papers shall be returned to the said justice or civil justice, who shall enter judgment against any surety given at the time of appeal as a matter of course."

(14) *When and how execution issued.*—By section 6029: "The justice rendering any judgment may issue a writ of *feri facias* thereon immediately, if there be not a new trial granted, nor an appeal allowed, nor a stay of execution; and where there is such stay of execution, if the judgment be not paid within the sixty days, a writ of *feri facias* shall thereupon be issued by a justice against the party and his surety jointly, on which no security shall be taken. When the judgment is for personal property, the plaintiff may, at his option, have a writ of possession for the recovery of the specific property and a writ of *feri facias* for the damages and costs; and, if the writ of possession prove ineffectual, a writ of *feri facias* for the alternative value; said writ of possession to be directed to, executed, and returned by the same officer who would execute the writ of *feri facias*."

(15) *How directed and returnable; how renewed.*—By section 6030: "A writ of *feri facias* issued by a justice may be directed to any constable, and be executed by him in any part of his county or corporation, or may be directed to the sheriff or sergeant of any county or corporation, but in any case shall be returnable in sixty days. If not wholly satisfied, it may, within one year from the date of the judgment, be returned to and renewed by a justice, notwithstanding the provisions of chapter 112 [as to sheriffs, sergeants, constables, etc.]. But every execution issued by a justice which is not so returned and renewed shall be returned by the officer to the clerk's office of the circuit court of the county or corporation court of the city in which the execution issued. The said justice shall also return to the said office an abstract of the judgment in each case tried by him, together with all of the papers in the case. For docketing and filing such executions, and for filing such abstracts of judgment with the accompanying papers, the clerk's fees, to be paid by the plaintiff and embraced in the judgment for costs in each case, shall be collected by such constable, sheriff, or sergeant when collecting his own fees, and paid over to the clerk at the time of returning such papers to the clerk's office as hereinbefore provided."

(16). *Clerk to docket and index executions; his fee; how further executions issued and directed.*—By section 6031: "The clerk shall docket all executions returned by the officer and index the same in the name of both plaintiff and defendant, and file them alphabetically, in a separate bundle for each year, for which services the clerk shall be entitled to a fee, to be paid by the plaintiff in each case, of twenty cents. Such further executions may be issued for the recovery of the amount due on any execution so returned, as if the judgment on which it issued had been rendered in court. The same may, at the option of the plaintiff, be directed to and executed either by a constable, or by a sheriff or sergeant; and the same proceedings shall be had upon executions issued under this section as upon executions issued upon judgments of courts."

(17) *In proceedings against officer for failure to pay over money, etc.; what to be evidence; duty of justice.*—By section 6032: "A copy from the entry in the justice's book of the date of any execution issued by him, and to whom delivered, shall be evidence in any proceeding against the officer to whom it is entered as delivered, for failing to make due return thereof, or for failing to pay over money received thereon. If a justice, upon being applied to for a copy of any entry, refuse it, and afterwards, upon being summoned to produce the book in which such entry is or ought to have been made, fail to produce such entry, he shall forfeit \$20 to the person on whose behalf he is summoned."

(18) *Officer fined for failure to return execution; motion before, and judgment by justice against officer and sureties for amount of execution.*—See section 3, (j), below.

(19) *Officer and sureties liable for money collected after, as well as before, return day of execution; also for moneys received for claims; when receipt therefor evidence of collection.*—See section 3, (k), below.

(20) *Proceedings before a justice to try the title to property levied on under distress warrant or execution from justice; when and how allowed.*—See section 3, (l), below.

(21) *Duty of justice and clerk when appeal allowed.*—By section 6036: "The justice from whose judgment an appeal is allowed shall immediately deliver to the clerk of the court which has the cognizance of the appeal the original warrants

with the judgments and the name of the surety endorsed thereon, together with all the exhibits before him shown at the trial, and the clerk shall forthwith docket the same, and the justice granting the appeal shall not nor shall the appellant without the leave of court after due notice to the appellee withdraw said papers from the clerk's office."

(22) *Where appeal cognizable.*—By section 6037: "When an appeal is allowed from any order or judgment of a justice, it shall be cognizable by the circuit court of the county or the corporation court of the city in which the order was made or judgment rendered, except when the order is made or judgment rendered in a city, in a case involving the constitutionality or validity of an ordinance or by-law of said city, in which case it shall be cognizable by the circuit court having jurisdiction over said city."

(23) *How tried; judgment.*—By section 6038: "Every such appeal shall be tried by the court in a summary way, without pleadings in writing, or, if the amount in controversy exceed \$20 dollars, by a jury, if either party requires it. All legal evidence produced by either party shall be heard, whether the same was produced or not before the justice from whose decision the appeal is taken, and the case shall be determined according to the principles of law and equity. If judgment be recovered by the appellee, execution shall issue against the principal and his surety, jointly or separately, for the amount of such judgment, including interest and costs, with damages on the aggregate at the rate of ten per centum, per annum, from the date of that judgment until payment, and for costs of the appeal; and the execution shall be endorsed: 'No security is to be taken.' If the decision be reversed, the party substantially prevailing shall recover his costs; and such order or judgment shall be made or given as ought to have been made or given by the justice. Where the appeal is from an order or judgment, under section 6035, the court shall give such judgment respecting the property, the expense of keeping it, and any injury done to it, as may be equitable among the parties."

(24) *Notice to try appeal; preference over other cases.*—By section 6039: "Either party to an appeal may give ten days' notice to the other party that a motion will be made to

try the appeal, and the court shall, on the day named in the notice, if the business of the court will permit, try the appeal, without regard to its place on the docket, unless good cause be shown by the adverse party for a continuance, and, if so continued, shall try it as soon as may be thereafter."

(25) *To give circuit courts jurisdiction of scire facias or action to revive judgments of justices of the peace.*—By section 6040: "Upon a judgment rendered by a justice, a *scire facias* or action may be brought, within the time prescribed by sections 6477 and 6478, in the circuit court of the county in which the judgment was rendered, whenever there is an abstract of such judgment entered on the lien docket in the clerk's office of said court, or in the clerk's office of the former county court of said county, or where a *feri facias* issued upon such judgment has been returned to either of such clerk's offices, and entered on the execution book."

§ 3. Other matters as to warrants for small claims.—

(1) *Form of the warrant.*—The practice of more than two centuries leads us to presume that the legislature never intended to perplex the justice with the nice distinctions between the various forms of actions, as debt, detinue, trover, assumpsit, covenant, trespass, and trespass on the case. The warrant should issue as near as may be in the language of the statute, summoning him to answer a claim to specific personal property, money, or damages, as the case may be, describing the claim with sufficient certainty to notify the defendant of its true character; and all mere technical distinctions should be discouraged, if not entirely disregarded. A claim "to specific personal property" is asserted by a warrant in detinue or in trover; a claim "to any debt, fine, or other money," by a warrant in debt; and claim to "damages for breach of any contract, or for any injury done to property, real or personal," by a warrant in damages.

At common law the plaintiff in detinue recovers the specific chattel, if to be had, or if not, its alternative value at the time of the verdict, and damages in either case; while in trover and conversion, he recovers the value of the chattel at the time of the conversion. So that, if the thing possesses a special value—a *pretium affectionis*—or is likely to appreciate in value, detinue were the better remedy, while if it has no

specific or peculiar value, nor is likely to appreciate in value, and especially if it is likely to depreciate in value, and most especially if it is perishable, trover and conversion should be used.

But by statute in Virginia, (§ 6022), the justice, whether in detinue or trover, must render judgment according to the principles of law and equity, and "for the property to which the plaintiff is entitled (or its value) with damages."

To sustain a warrant in detinue, the plaintiff must have an absolute or special property in what he seeks to recover, and a right to the immediate possession of it at the time the warrant was brought, and the defendant must have had possession of the chattel some time anterior thereto, and it matters nothing that he has it not at the bringing of a warrant, or has improperly parted with it prior or subsequently thereto.

To support a warrant in trover, the plaintiff must have had, at the time of the conversion, an absolute or general property in the chattel and also the actual possession or the right to the immediate possession of it. The conversion may be by wrongfully taking or detaining the chattel or by illegally using or misusing it or assuming ownership over it.

(2) *Collateral proceedings on warrant in detinue.*—By sections 5797-8 of the Code, it is provided, in the case of a warrant in detinue before a justice, that if it appear by proper affidavit that the defendant is insolvent, and that the property sued for will be sold, removed, secreted, or otherwise disposed of, so as not to be forthcoming to answer the final judgment, or will be materially injured by neglect, abuse, or otherwise, if left in the defendant's possession, the justice shall, upon proper bond being given, issue an order or process commanding the officer to seize the property and deliver the same to the plaintiff. But the defendant may relevy or retake it by means of a bond conditioned to pay all damages by reason of the return of the property to him, and also to have it forthcoming to answer the judgment of the justice; unless the property be perishable or expensive to keep, when it may be sold by order of the justice. For particulars, see the statute, and §§ 5799-5804.

(3) *Who may sue and be sued.*—By the statute (§ 6015), a justice has equity as well as common law jurisdiction, so

that claims *ex contractu* (arising from contract) or *ex delicti* (arising from some wrong), whether legal or equitable merely, may be asserted by the person owning such interest. Thus, by virtue of this statute alone, the assignee or beneficial owner of a bond, note, writing, or other chose (i. e., thing or property) in action, may warrant thereon in his own name. The assignment need not be in writing, it being sufficient that there was an intention to assign, on the one side, and assent to receive, on the other, even though there be no consideration.

As to who may be made defendant in a warrant *ex contractu*, it may be answered generally, any one who promises, whether by himself or by his duly authorized agent or partner; and likewise in warrants *ex delicti*, he should be made defendant who committed the tort (i. e. the wrong), whether by his own hands or by the hands of his servant or agent in the course of his employment.

Infancy (i. e., being under 21 years of age) is always a defense to a warrant based upon a contract; for an infant cannot bind himself by contract, yet may bind his father upon a contract for necessities suitable to his real position in society. But an infant is liable and may be sued for a mere tort—i. e., a civil injury other than such as arises out of the breach of a contract. Thus, an infant may be sued in detinue or trover, or in damages for injury to property, provided the warrant has not its foundation in a contract.

A married woman is empowered by statute (Code, § 5134) to sue or be sued, as if she were unmarried, and her husband need not be joined with her in a warrant. So that, a married woman may, by herself, sue or be sued, upon contracts or for torts whether in debt, detinue, trover, or damages. The husband is exempted by statute from all his common law liability for his wife's ante-nuptial contracts and torts, and her post-nuptial contracts and torts.

(4) *Within what time warrant must be brought*—Equity generally follows the law as to limitations, so that a warrant before a justice should be brought within the following number of years next after the right to bring the same shall have first accrued.

If it be in detinue or trover or in damages for an injury to property, 5 years; if it be upon a contract under seal, 10

years; contract in writing not under seal, 5 years; any other contract, expressed or implied, 3 years, except accounts concerning the trade of merchandise between merchant and merchant, their factors or servants, in which case the limitation is 5 years from a cessation of the dealings in which they are interested together; but if any such debtor die before warrant is brought, the limitation is, if the right accrued before his death, 5 years after the qualification of his personal representative; if after his death, 5 years after the right accrued. (Code, § 5810.)

A contract made and to be performed in another state or country by a person then residing therein, is governed by the limitation laws of either place. (Code, § 5825.)

When there is a new promise in writing to pay a debt, or a distinct acknowledgment in writing that a definite amount is due, and not merely a promise to settle or acknowledgment that something is due, limitation commences to run only from the time of such promise or acknowledgment; but this does not apply to a personal representative so as to bind the estate of the decedent, nor to one joint-contractor so as to bind another or others. The warrant may be on the new or old promise, except when the latter is merged in the former, when it must be on the former. (Code, §§ 5812-13.) But in detinue, a subsequent acknowledgment of title made within the 5 years, does not enlarge the time of limitation. (84 Va. 331.)

If right accrues and creditor dies, the limitation continues to run; but if the right accrues after his death, it commences to run only when some one qualifies as his administrator or executor, and if that is delayed for more than two years, limitation runs from the end of the two years. (Code, § 5824.)

If the defendant was a resident of Virginia before the right accrued, and by departing therefrom, or by absconding, or concealing himself, or by any other direct ways or means has obstructed the prosecution of the plaintiff's right, the time such obstruction may have continued shall not be computed as a part of the time within which the right might or ought to have been prosecuted; but this is to apply only as against the party obstructing, and not as to another jointly liable with him, nor to such grantees for value

and those claiming under them as are mentioned in 6474 of Code. (Code, § 5825.)

(5) *When and how warrant may be served.*—The warrant may be served at any time of the day or night and on any day of the week, except Sunday (Code, § 2823). It must be served as a notice or process is served under sections 6041, 6063, and 6064 of Code—see also §§ 6065, 6067. See *Notice*.

For return of service on an individual, see Nos. 16 and 17, under section 4, below.

For what the return of service on a corporation must show, see *Corporations*, Nos. 28 and 29 under section 17.

(6) *Grounds for continuance.*—The reason assigned for a continuance must be proved, in general, by the oath of the defendant or some one else, and the court should be satisfied that the accused has used all proper diligence to prepare for trial; that the cause alleged endangers injustice being done to himself if a continuance were denied; and that there is a reasonable probability that a continuance will enable him to make the desired preparation for trial. The most usual ground on which a continuance is asked is the absence of material witnesses, who have been duly and reasonably summoned. Repeated applications for continuance from time to time are viewed with increasing suspicions, and then not only will the accused be required to state what he expects to prove by the absent witnesses, but he must, in all respects, bring himself clearly within the rule above stated. The motion is addressed to the sound discretion of the court.

(7) *Witnesses and evidence.*—See *Evidence*.

(8) *Set-offs and other defenses.*—In a warrant for a debt, the defendant may prove and have allowed, as a set-off against such debt, any debt which he may have against the plaintiff. But, observe, only debt can be set against debt, and not damages against debt, nor debt against damages; yet the debt may be merely equitable, as in case of an assigned judgment, bond, or note, in which case, if the assignment be after the warrant is brought, the defendant should pay the costs. And an individual debt cannot be set off against a partnership debt, nor *vice versa*; nor against a debt claimed by a personal representative as such, nor *vice versa*; nor against a joint debt

of husband and wife, nor *vice versa*. Ordinarily, the set-off shall be due and payable; but in case of insolvency of the plaintiff, the justice, exercising equity jurisdiction, may allow it, even though it is not yet payable. And, governed by the like principles of equity, and in pursuance of his statutory authority, he may render judgment against the plaintiff for any excess (not exceeding \$300) of the set-off over his debt, with interest. But where the plaintiff sues on a debt that he claims as assignee, he must, in equity, as by statute, allow all just discounts (which includes set-offs as well as other equities), not only against himself, but against all assignors, before the defendant had notice of the assignment. (Code, § 5768.)

In a warrant on any contract, whether for debt or damages, a justice should permit the defendant to prove failure of consideration, fraud in the procurement of the contract, mistake therein, or any such like defense.

For defense of surety, see sections 5774-5 of the Code, and *Sureties*.

(9) *Warrant against several defendants*.—The warrant or judgment may be against several or all—see Code, §§ 6263-5, and *Suits and Actions*.

(10) *Judgment when instrument waives homestead*.—If the judgment is rendered on an instrument waiving the homestead, or upon a demand against which the homestead cannot be claimed, the justice as well as a court should include in his judgment words to the following effect: "Upon an instrument waiving the homestead," or "upon a claim against which the homestead cannot be demanded." This statement should likewise be endorsed upon the execution issued upon such judgment. (Code, § 6551.)

(11) *Lien of judgment*.—A judgment is a lien on all the real estate of the debtor at or after the date of the judgment. (Code, § 6470.) For lien of execution, see (14), (c), below.

(12) *General principles governing motion for new trial*.—A motion for a new trial is governed by the same rules in civil as in criminal cases. In awarding new trials the justice should act, not arbitrarily, but according to sound discretion, to prevent a gross, palpable, and material wrong; and if sub-

stantial justice has been done, the motion should be denied, even though irregularities have occurred, or where the wrong, however palpable, is trivial in extent.

(a) *After-discovered evidence.*—A new trial is granted with great reluctance and only under very special circumstances. Thus: The new evidence must not only have been unknown, but by reasonable diligence could not have been known by the accused at the former trial. This is usually shown by the affidavit of the party, which must be credited unless the contrary appears. And the substance of the new evidence must likewise be sworn to by the witnesses themselves, or by some one who has heard their statements; for it must appear that the evidence is material and such as ought to produce a different verdict on a new trial, and not merely cumulative, corroborative, or collateral testimony, or such as merely tends to discredit an adverse witness.

(b) *Accident, surprise, or fraud.*—Accident and surprise are grounds for a new trial where there is no default in accused or his counsel, as where defendant is prevented by detention of the train from attending trial, or the like. So, likewise, fraud or misconduct on part of prosecutor, as tricking the accused out of his evidence, or the like, is ground for a new trial.

(c) *Mistake as to law.*—The justice may sometimes err in rejecting legal evidence, or in receiving evidence not legal, or may otherwise mistake the law; in either case, if, upon further consideration, he be satisfied that he erred, and that the justice of the case requires it, he should award a new trial.

(d) *Number of new trials.*—Although section 6260 of the Code says "not more than two new trials shall be granted to the same party in the same cause," and section 3522 conditions the granting thereof, upon the previous payment of the costs of the former trial, yet this is the rule at law in courts of record; and so the number of new trials before a justice lies in his equitable discretion, to be exercised only so often as justice demands, and not merely to gratify the whim of a discontented litigant, or to pose before him as being an extremely fair, impartial, and generous justice, for that evinces weakness, occasions mistrust, and besides accumulating costs, works uncertainty and discontent.

(e) *When and by whom new trial awarded.*—See section 2, (11), above.

(13) *Appeals.*—See section 2, (12), above.

In cattle guard cases, either party may appeal, regardless of the amount in controversy. (See Code, § 3954.)

(14) *Execution.*—(For issue, return and docketing, see section 2, (14), (15), and (16), above.)

(a) *Motion to quash an execution.*—By section 6499 of the Code, "The motion to quash an execution may, after reasonable notice to the adverse party, be heard and decided by the justice who issued the execution, or the circuit court of the county or corporation court of the corporation in which such justice resides. * * *"

An execution may be quashed for a variance from the judgment in respect to amount, parties, or otherwise, or for any material irregularity; or where the judgment has been satisfied, or an appeal is afterwards allowed, or a new trial granted, or where the justice has not jurisdiction either to render the judgment or to issue the execution. For form, which may be easily adapted, see *Motions for Money*.

(b) *Garnishment proceedings on an execution.*—On a suggestion by the judgment creditor that, by reason of the lien of his writ of *feri facias*, there is a liability on any person other than the judgment debtor, a summons may be issued by the justice (but by the clerk and proceeded in as in other suggestions in court, if the execution has been returned to his office as provided in the next section), against said person, and a copy thereof shall be served on the judgment debtor as well as on the said person; but if he be a non-resident, no order of publication is necessary. Such summons may be made returnable before any justice of his county or corporation, and shall be made returnable within sixty days at some designated place therein and within the magisterial district wherein such judgment debtor resides at the time of the service of the summons. (Code, § 6509.)

The person summoned shall be examined on oath. If it appear on examination that there is any such liability on him, the justice may give judgment against him for any amount found due the execution debtor, and order him to deliver any estate for which there is any such liability, or pay the value of

such estate to any officer whom he may designate; and the levy of an execution on such order shall be valid, although levied by such officer. (Code, § 6510.)

If such person, after being served with the summons fail to appear, or if it be suggested that he has not fully disclosed his liability, the justice may, in the first case, compel him to appear, or, in either case, hear proof of any debts, owing by him or of effects in his hands belonging to the defendant, and proceed to judgment accordingly. (Code, § 6511.)

But any person so summoned as a garnishee may, before the return day of the summons, deliver and pay to the officer serving it what he is liable for; and the officer shall give a receipt for, and make return of, what is so paid and delivered. (Code, § 6512.)

Yet, unless such person appear to be liable for more than is so delivered and paid, there shall be no judgment against him for costs. (Code, § 6513.)

For who may or may not be garnisheed, see sections 6555 and 6558-61 of the Code, and *Homestead and Other Exemptions*.

(c) *What execution may be levied on; lien thereof.*—The writ commands the officer to make the money out of the goods and chattels of the defendant; and if there be several defendants, the property of either or all of them may be taken. If the property of one, not a defendant, is taken, the officer is a trespasser, and the ownership of the goods is not divested either by the levy or sale. The rule which purchasers must observe is *caveat emptor*—let the buyer beware. The claimant of property thus illegally seized, has the following remedies:

(1) Against the officer or the creditor (if the levy was made by his direction) for the damages occasioned by the trespass;

(2) Against the officer and creditor, by injunction, in cases where the property possesses a *pretium affectionis*—a value derived from sentiment or special affection for it;

(3) Against the creditor for money had and received to the claimant's use, the proceeds of the sale having been paid over;

(4) Against the purchasers, either in detinue or trover and conversion;

(5) By process of interpleader, whereby the creditor and claimant litigate, before sale, their respective rights to the property levied on. See (1), below.

(6) By proceeding on the indemnifying bond. See *Indemnifying Bond*.

As to (3), (4), and (5) of these remedies, a justice has jurisdiction, if the amount in controversy does not exceed \$300.

As to the kind of property that may be levied on, and the lien thereon, section 6485 of the Code provides that the writ may be levied as well on the current money and bank notes as on the goods and chattels of the defendant, except such as are exempt under the homestead, poor man's, and laboring man's laws; and shall bind what is thus capable of being levied on only from the time it is delivered to the officer, but ceasing on the return-day of the writ; but property duly levied on, may be advertised and sold within a reasonable time after the return day, and such levy may also be enforced after the return day under section 6503, if the proceedings be commenced before that day. Section 6488 makes it the duty of the officer to endorse on the writ the year, month, day, and time of day he receives it; and section 6489 requires that the writ first received shall be first levied and satisfied. Besides this lien, section 6501 makes an execution a lien, from the time of its receipt by the officer (and section 6502 continues it after the return day), on all the personal estate, from its nature not capable of being levied on, of or to which the defendant is, or may afterwards, and before the return-day, become possessed or entitled, except as to the above exemptions, or an assignment for value or a payment to defendant, without notice in either case. See *Executions*.

"No growing crop of any kind (not severed) shall be liable to distress or levy, except Indian corn, which may be taken at any time after the 15th day of October in any year; and, also, except sweet potatoes and Irish potatoes over five barrels of each variety may be distrained or levied upon after the same have been matured sufficiently to sever or to market. (Code, § 2830.) Does lien of execution, though in hands of officer, attach to growing crops, until time arrives when they may be levied on?

A debt of a co-partnership is several as well as joint, and an execution or attachment may be levied on separate estate of either of the partners, or on the partnership effects; also, under execution or attachment against one partner, the entire partnership effects may be levied on and his interest sold, the purchaser becoming a co-partner with him.

By section 6486 of the Code (added by the Revisors) the former law is changed. Now, property subject to a lien or in which the debtor has only an equitable interest, may be levied on and sold, the officer paying the lien out of the proceeds, if the lien is due; if not due, he sells subject to the lien.

(d) *Homestead exemption.*—(See *Homestead and other Exemptions.*)

(e) *Poor man's exemption.*—(See under *Attachments*, div. II., section 6, below; and *Homestead and other Exemptions.*)

(f) *When and how execution levied.*—The writ may be levied at any time of the day or night, and on any day of the week, except Sunday (Code, § 2893). It must be levied on or before the return-day; but if so levied, the officer may, within a reasonable time, proceed to sale and collect the money after the return-day (Code, § 6485). So, likewise, if it be issued before, it may be levied after either party's death.

To make a proper levy, it is not necessary to remove or even touch the property. It is enough if the officer, having the goods in his view or power, declare that he seizes them to satisfy the execution. So that, if the property is locked up, as in a stable, no levy can be made, even though the officer can see the property.

In levying an execution, the officer may now break open an outer door of the defendant's dwelling in the day-time (Code, § 6490); and he may break open inner doors or chests, or the outer doors of out-houses, or even of a stranger's dwelling, but, in this latter case, at the peril of finding the goods therein.

Neither is the property protected from the levy of an execution (as it is in case of distress), by being in defendant's actual use, as, a horse which he is riding, or the like; but the officer may dispossess him, using as little violence as possible for the purpose. Indeed, § 6490 of the Code allows a levy

on "property in the personal possession of the debtor, if the same be open to observation." Unreasonable levies, however, are expressly prohibited by section 2831 of the Code; and it is therefore improper for the officer to sell more of the property than is necessary to satisfy the execution, if a part can be detached without material prejudice and sold separately.

To resist or impede an officer in making a levy is a misdemeanor; and, if it be anticipated, he may summon the *posse comitatus*—power of the county—to assist him. (See Code, §§ 4525, 2822.)

(g) *Indemnifying, suspending, and forthcoming bonds.*—See *Bonds; Forthcoming Bond; and Indemnifying Bond.* For a motion before a justice on a forthcoming bond, see *Forthcoming Bond.*

(h) *Safe-keeping and sale of property levied on.*—By section 2831 of the Code: "For horses, or any livestock distrained or levied on, the officer shall provide sufficient sustenance while they remain in his possession. Nothing distrained or levied on shall be removed by him out of the county or corporation, unless where it is otherwise specially provided." And by section 4447, "If any person fraudulently remove, destroy, or secrete any goods and chattels that have been distrained or levied on, with intent to defeat such distress or levy, he shall be deemed guilty of larceny thereof"—grand or petit, according as the value is greater or less than \$50.

By sections 2832-4: "In any case of goods and chattels which an officer shall distrain or levy on, otherwise than under an attachment, or which he may be directed to sell by an order of a court, judge, or justice (unless such order prescribe a different course), he shall fix upon a time and place for the sale thereof, and post notice of the same at least ten days before the day of sale at some place near the residence of the owner, if he reside in the county or corporation, and at two or more public places in the officer's county, city, or district. If the goods and chattels be expensive to keep or perishable, the court from whose clerk's office the writ of *feri facias* was issued, or the judge thereof in vacation, or the justice who issued the writ of *feri facias*, or the distress warrant under which the seizure is made, or if the distress warrant was issued by a clerk, the court of which he is clerk, or the judge

thereof in vacation, upon the application of any party on reasonable notice to the adverse party, his agent, or attorney, may order a sale of the property seized under such *feri facias* or distress warrant to be made upon such notice less than ten days, as to such court, judge, or justice may seem proper. At the time and place so appointed, such officer shall sell to the highest bidder, for cash, the said goods and chattels, or so much thereof as may be necessary. If such goods and chattels be mules, work oxen, or horse, the sale shall be made after advertising the same for thirty days by hand bills posted at the front door of the court-house and at five or more public places in the county or city, and when the sale is to take place in any county, the places for posting such notices must be at least two miles apart. Where the parties shall at or before the time for advertising the sale in writing authorize the officer to dispense with the provisions of this section, then the sale shall be according to the preceding section.

When there is not time, on the day appointed for any such sale, to complete the same, the sale may be adjourned from day to day until completed.

The sale may be after the return day (§ 6485), and even after the sheriff is out of office, or he, or either party, is dead (Code, § 2816).

The officer should conduct the sale as a prudent man desirous to get the best price would do in respect to his own property; hence, he ought, in general, to sell each article separately, and not *en bloc*. Neither shall he sell for a very inadequate price, but must return that he has levied the execution, and that the goods were not sold for want of bidders.

Section 6492 provides that if the purchaser at the sale fail to comply with the terms thereof, the officer may sell the property, either forthwith or under a new advertisement, or return that it was not sold for want of bidders. And if, on a re-sale, the property brings less than at first, the first purchaser is liable for the difference to the creditor, so far as required to satisfy him; and to the debtor for the balance.

Section 6493 provides that when it appears by the return on an execution that property taken to satisfy it remains unsold, there may issue a writ of *venditioni exponas*—a writ commanding the officer to expose to sale the goods and chattels

taken under an execution, and remaining unsold—whereupon the like proceedings shall be had as might have been had on the first execution, except that if it issue for want of bidders or of a sufficient bid, the notice shall state the fact, and that the sale will be made peremptorily—i. e., without fail.

(i) *Officer's return upon an execution.*—By section 2825 of the Code: "Every officer to whom any order, warrant, or process may be lawfully directed, shall make true return thereon of the day and manner of executing the same, and subscribe his name to such return. Where the service is by a deputy, such deputy shall subscribe to the return his own name as well as that of his principal [as, J. R., deputy for X. Y., sheriff of ——— county].

"With such order, warrant, or process there shall be returned any bond taken and an account of sales made under the same, specifying therein the several articles sold, the person to whom sold, and the prices thereof. * * * Any officer failing to comply with that section shall forfeit \$20, and if he make a false return he shall forfeit therefor \$100."

By section 6491; "Upon a writ of *fiery facias* the officer shall return whether the money therein mentioned is or cannot be made, or if there be only part thereof which is or cannot be made, he shall return the amount of such part. With every execution under which money is recovered, he shall return a statement of the amount received, including his fees and other charges, and such amount, except the fees and charges, he shall pay to the person entitled. In his return upon every execution, the officer shall also state whether or not he made a levy of the same, the date of such levy, and the date when he received such payment or obtained such satisfaction upon the said execution; and if there be more than one defendant, from which defendant he received the same." If any surplus remain after satisfying the execution, the officer must repay the same to the debtor (Code, § 6495).

But if the sale was indemnified, the surplus is to be paid into court, or under the direction of the court according to section 6158 of the Code.

A process to or from another county or corporation may be sent by mail, and proof by the certificate of the postmaster or his deputy, given at the time, or otherwise, that it was duly

mailed is *prima facie* evidence that it was received; but the officer to whom it was addressed may exonerate himself by making oath that it was not received by him, nor, as he verily believes, by any of his deputies (Code, § 902). But an officer is not required to go out of his county or corporation to pay money received by him under an execution (Code, § 6496).

(j) *Officer fined for failure to return execution; motion before, and judgment by justice against officer and sureties for amount of execution.*—By section 6033 of the Code: "If an officer fail to make due return of an execution issued by a justice he may, after ten days' notice be fined from time to time by a justice, on the motion of the plaintiff in such execution, in like manner as a court may fine an officer who fails to make due return of an execution issued from such court [to-wit: he may, for the benefit of the plaintiff, fine the officer a reasonable sum, and from time to time impose on him other reasonable fines not exceeding altogether the rate of 5 per cent. of the sum mentioned in the execution for each month that such failure continues—see section 2826 of Code.] And if an officer make such return upon an execution issued by a justice as would, on a motion against the officer, authorize judgment to be entered against him for the amount of the execution, or any part thereof, if the execution had issued from a court [i. e., if he make a return by which it appears that he has received money on the execution—see section 2825 of Code], the creditor on whose behalf such execution issued or his personal representative, may, in a motion before a justice, after like notice, obtain such judgment against the officer, his sureties, and others [i. e., his and their personal representative or a deputy and his sureties, and his and their personal representatives—see section 2825 of Code] as could be given by a court, if the execution had issued from a court [i. e., for the amount so received, with interest thereon at the rate of 15 per cent. per annum from the return day of the execution till payment]. This section shall not prevent a motion in court under chapter 112, or under section 6045."

For forms which may be easily adopted to this section, see *Motions for Money*.

For what may be evidence in such proceeding, see section 2, (17), above.

(k) *Officer and sureties liable for money collected after, as well as before, return day of execution; also for moneys received for claims; when receipt therefor, evidence of collection.*—By section 6034 of the Code: "If any officer after the return day, collect money mentioned in an execution issued by a justice he and his sureties shall be liable for the money so collected in like manner as if the collection had been before the return day. And if a constable receive money on account of any claim entrusted to him to warrant for, and recoverable by warrant, he and his sureties shall be liable for the money so received, as for money collected under execution; and after six months from the date of any receipt for such claim, signed in his official character, such receipt shall be *prima facie* evidence of the receipt of the money."

As above stated, after six months the receipt of an officer, signed in his official character (and abbreviations for office and county suffices) is *prima facie* evidence of its collection; and in that case, as in the case of an execution, his receipt is evidence that the claim or execution came to his hands even though it does not purport to be given in his official character.

(1) *Proceedings before a justice to try the title to property levied on under distress warrant or execution from justice; when and how allowed.*—Section 6035 provides: "When an execution on a judgment of a justice, or warrant of distress, is levied upon property which is claimed by any person other than the party against whom it issued, and affidavit is made either by the claimant, the officer having such process, or the party issuing the same, that to the best of said affiant's belief the said property is not of greater value than \$20, the party making said affidavit may apply to a justice of the county or corporation in which the levy is for a warrant to a constable requiring him to summon both the creditor and debtor to show cause why such property should not be discharged from the levy; a copy of which warrant shall be served upon the claimant of said property, unless said warrant is sued out at his instance. The justice shall issue such warrant returnable in not less than five days, and if an earlier day shall have been fixed for the sale of the property, he shall make an order on the warrant requiring the postponement of the sale until after

the return day. Upon hearing the parties, or such of them as may attend after being summoned, and such witnesses as may be introduced by either party, he shall order the officer to deliver the property to the claimant, if he be of opinion that the same belongs to said claimant; but if he be of opinion that the property belongs to the person against whom the execution or warrant of distress issued, he shall order the officer who levied on the same to sell said property to satisfy said execution, or warrant of distress, and may give such judgment for costs as he may deem just. If the property be of the value of \$10 or more, the justice shall, within five days, allow an appeal (if applied for) from such order and judgment on security being given as in the appeals before mentioned in this chapter."

For similar proceedings by way of interpleader in attachment cases see *Justice of the Peace*, div. II. ("Attachments Triable by a Justice"), section 12, and Code, § 6407. For proceedings in court where the property levied on exceeds \$20, see *Interpleader*.

For forms under above section, see Nos. 34-40, below.

§ 4. Various forms under "Warrants for Small Claims."

NO. 1. AFFIDAVIT TO BE FILED WITH ACCOUNT.

(Code, § 6016.)

State of Virginia, County of _____, to-wit:

This day personally appeared before me, J. T., a justice of the peace in and for the county aforesaid, in the State of Virginia, P. P., who made oath before me in my said county that he is plaintiff (or *the agent of the plaintiff*) in a certain warrant to be brought on the annexed account before a justice of the peace of the county of _____ and that said account states distinctly the several items of the plaintiff's claim, and the aggregate amount thereof, and the time from which interest is claimed, and the credits, so far as the same exist, and that the amount of said account, to-wit, _____ dollars, is justly due, with lawful interest thereon from the _____ day of _____, 192—.

Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

NO. 2. COUNTER AFFIDAVIT BY DEFENDANT.

(*Idem.*)

State of Virginia, County of _____, to-wit:

This day personally appeared before me, J. T., a justice of the

peace in and for the country aforesaid, in the state of Virginia, D. D., who made oath before me in my said county, that he is defendant (or *agent of the defendant*) in a certain warrant pending before a justice of the peace of the county of _____, and that he, the said affiant, verily believes that the plaintiff is not entitled to recover anything from said defendant on the account filed therein), if the defendant wishes to admit a part of the claim, he may add to the above "save only the sum of _____ dollars, with interest thereon from the _____ day of _____, 192—, until paid, which is all the said plaintiff is entitled to recover from the said defendant").
Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 3. APPLICATION FOR REMOVAL OF WARRANT TO COURT.
(Code, § 6017.)

To Worshipful, J. T., Justice of _____ County:

I, D. D., the defendant in the warrant of P. P. against me, returnable on _____ day of _____, 192—, at _____, in _____ county, before J. T., a justice of said county, the amount (or *thing*) in controversy therein exceeding the sum (or *value*) of \$50, do pray that the said cause be removed to the circuit court of said county; and to that end I herewith pay you the costs accrued and writ tax, as required by law. This _____ day of _____, 192—. D. D.

A written application is probably not necessary, but it may oftentimes be convenient.

No. 4. ENDORSEMENT OF REMOVAL OF WARRANT TO COURT.
(*Idem.*)

_____ county, to-wit:

The amount (or *thing*) in controversy in the within (or *above* or *foregoing*) warrant exceeding the sum (or *value*) of \$50, I do, upon application of defendant before trial, and payment by him of costs accrued and writ tax remove the cause and all the papers thereof to the circuit court of _____ county.

Given under my hand and seal, this _____ day of _____, 192—.

J. T., J. P.

No. 5. WARRANT IN DETINUE OR TROVER, FOR SPECIFIC PERSONAL PROPERTY.

(Code, §§ 6015-20.)

Virginia, _____ County, to-wit:

To X. Y., constable (or *sheriff*) of said county:

You are hereby commanded to summon D. D., if to be found in your county, to appear at _____, in said county, on the _____ day of _____, 192—, at _____ a. m. (or *p. m.*), before me or such other justice of said county as may then be there to try this warrant, to

answer the claim of P. P., in detinue (or *in trover and conversion*, as the case may be), for [here describe the property with certainty] of the value of ——— dollars, which, the said P. P. claims to be his property, and which, as he alleges, the said D. D. unjustly detains from him (or *the said D. D. has converted to his own use*, if the warrant be in trover), and then and there make return of this warrant.

Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

No. 6. AFFIDAVIT FOR WARRANT TO SEIZE PROPERTY IN DETINUE.
(Code, §§ 5797-5804.)

I, P. P. (or A. T., *attorney or agent for P. P.*), plaintiff in the warrant in detinue of P. P. against D. D., returnable on the ——— day of ———, 192—, at ———, in ——— county, before J. T., a justice of said county, for the recovery of [here describe the property as in the warrant, stating kind, quantity and value], do solemnly swear (or *affirm*) that I verily believe that I am (or *the said P. P. is*) entitled to recover the said property; and that I have good reason to believe that the said defendant, D. D., is insolvent, so that any recovery against him for the ultimate value of the said property and for damages and costs will probably prove unavailing (or *that the said defendant, D. D., will sell, remove, secrete or otherwise dispose of the said property, so that the same will not be forthcoming to answer the final judgment of the said justice, respecting the same; or that the said defendant, D. D., will destroy or materially damage or injure, by neglect, abuse, or otherwise, the said property*) if the said property is permitted to remain longer in the possession of the said D. D. (or *of D. E., who claims under the said D. D.*)

Given under my hand, this ——— day of ———, 192—.

P. P. (or A. T., *attorney or agent for P. P.*)

——— county, to-wit:

Sworn to by the above P. P. (or A. T.), before me, in my said county, this the ——— day of ———, 192—.

J. T., J. P. (or other proper officer).

No. 7. BOND UPON APPLICATION FOR WARRANT TO SEIZE PROPERTY IN DETINUE.
(*Idem.*)

Know all men by these presents, that we, P. P. (or *other person*) and S. S. are held and firmly bound unto D. D. in the just and full sum of ——— dollars, (not less than double the value of the property claimed), to the payment whereof, well and truly to be made to the said D. D. (the defendant), we bind ourselves jointly and severally firmly by these presents, and we hereby severally waive the benefit of our homestead exemptions as to this obligation. Witness our hands and seals, this ——— day of ———, 192—. Yet upon this condition, that whereas P. P. (or A. T., *attorney or agent for P. P.*), plaintiff in the

warrant in detinue of P. P. against D. D., returnable on the ——— day of ———, 192—, at ———, in ——— county, before J. T., a justice of said county, for the recovery of [here describe the property as in the warrant, stating the kind, quantity and value], has made affidavit according to law, before J. T. (or N. P., or other proper officer), a justice of said county, whereupon and upon the due execution of this bond, the said J. T., justice aforesaid, will issue an order or other process, in due form of law, directed to the proper officer of said county, commanding him to seize the said property and deliver the same to the said P. P. Now, if the said P. P. (or other person) shall pay to the said D. D. all costs which may be awarded against him, the said P. P., in said warrant, and all damages which may accrue to the said D. D., or any other person, by reason of the seizure of the said property as aforesaid, then this obligation to be void, otherwise to remain in full force and virtue.

P. P. [L. s.]
S. S. [L. s.]

No. 8. WARRANT TO SEIZE PROPERTY IN DETINUE.
(*Idem.*)

Virginia, ——— county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

Whereas in the warrant in detinue of P. P. against D. D., returnable at ———, in ——— county, on the ——— day of ———, 192—, and now pending before me, J. T., a justice of said county, for the recovery of [here describe the property as in the warrant in detinue, stating the kind, quantity and value], affidavit has been made and bond given, according to the statute in such case made and provided:

These are, therefore, to command you forthwith to seize the said property, and deliver the same to the said P. P. Given under my hand and seal, this ——— day of ———, 192—.

J. T., J. P. [L. s.]

No. 9. BOND FOR RETURN OF PROPERTY TO DEFENDANT IN DETINUE.
(*Idem.*)

Know all men by these presents, that we, D. D. and S. S., are held and firmly bound unto P. P. (the plaintiff) in the just and full sum of ——— dollars (not less than double the value of the property claimed), to the payment whereof, well and truly to be made to the said P. P., we bind ourselves, jointly and severally firmly by these presents; and we hereby severally waive the benefit of our homestead exemptions as to this obligation. Witness our hands and seals, this ——— day of ———, 192—.

Yet upon this condition, that whereas, in the warrant in detinue, of P. P. against D. D., returnable at ———, in ——— county, before J. T., a justice of said county, for the recovery of [here describe the property as in the warrant in detinue, stating the kind, quantity and value], the said P. P. had, in due course of law, caused the said

property to be seized and taken from the possession of the said D. D., and the said D. D. now desires to have the said property returned to his possession, to be held by him until final judgment is rendered in the said warrant in detinue: Now, if the said D. D. shall have the said property forthcoming, at _____, in said county, on the _____ day of _____, 192—, to answer final judgment in the said warrant in detinue, respecting the same, and shall, furthermore, pay to the said P. P. all costs and damages which may be awarded against him, the said D. D., in said warrant, and damages which may accrue to any person by reason of the return of the said property to him, the said D. D., then this obligation is to be void, otherwise to remain in full force and virtue.

D. D. [L. s.]

S. S. [L. s.]

No. 10. WARRANT IN DEBT UPON A BOND, NOTE, OPEN ACCOUNT OR OTHER CONTRACT, OR FOR FINE.

(Code, §§ 6015-20.)

Virginia, _____ county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

You are hereby commanded to summon D. D., if to be found in your county, to appear at _____, in said county, on _____ day of _____, 192—, at _____ a. m. (or *p. m.*), before me or such other justice of said county as may then be there to try this warrant, to answer the claim of P. P., in debt, to-wit: for the sum of _____ dollars, due by bond (or *note* or *due bill* or *contract attached hereto*, or *for violation of section _____ of the Code of Virginia, 1887*, or as the case may be); and then and there make return of this warrant. Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 11. WARRANT IN DAMAGES FOR BREACH OF CONTRACT.

(*Idem.*)

Virginia, _____ county, to-wit

To X. Y., constable (or *sheriff*) of said county:

You are hereby commanded to summon D. D., if to be found in your county, to appear at _____, in said county, on the _____ day of _____, 192—, at _____ a. m. (or *p. m.*) before me, or such other justice of said county as may then be there to try this warrant, to answer the claim of P. P. to damages, to-wit: for the sum of _____ dollars, due for breach of contract made on the _____ day of _____, 192—, for this, that although the said D. D., did contract and agree to [here state the particular stipulation claimed to have been broken], he, the said D. D., has failed and refused to do and perform his said agreement, whereby he has broken the said contract, to the great damage of the said P. P., and then and there make return of this warrant. Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 12. WARRANT IN DAMAGES FOR INJURY TO PROPERTY.

(*Idem.*)

Virginia, _____ county, to-wit.

To X. Y., constable (or *sheriff*) of said county:

You are hereby commanded to summon D. D., if to be found in your county, to appear at _____, in said county, on the _____ day of _____, 192—, at _____ a. m. (or *p. m.*) before me or such other justice of said county as may then be there to try this warrant, to answer the claim of P. P. to damages, to-wit: for the sum of _____ dollars, due for injury done to property, for this, that the said D. D., on the _____ day of _____, 192—, in said county, did unlawfully (or *negligently*) kill one cow, of the value of _____ dollars, the property of the said P. P. (or do some other injury to either real or personal property, stating it); and then and there make return of this warrant. Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 13. RETURN ON WARRANT OR OTHER PROCESS OR NOTICE SERVED ON CITY OR TOWN.

(Code, §§ 6020, 6063, 2825.)

Executed on the _____ day of _____, 192—, by delivering a copy of the within process (or *notice*) to M. A., mayor (or *recorder* or an *alderman*, *councilman* or *trustee*) of the town (or *city*) of, in said town (or *city*), wherein he resides. ,

X. Y. *sergeant* (or *sheriff*) of town (or *city*) of _____.

No. 14. RETURN ON WARRANT OR OTHER PROCESS OR NOTICE SERVED ON OFFICER OF A DOMESTIC CORPORATION.

[See No. 28, under section 17, title *Corporations*.]

No. 15. RETURN ON WARRANT OR OTHER PROCESS OR NOTICE SERVED ON AGENT OF A DOMESTIC OR FOREIGN CORPORATION.

[See No. 29, under section 17, title *Corporations*.]

No. 16. RETURN ON WARRANT OR OTHER PROCESS OR NOTICE SERVED ON A INDIVIDUAL.

(Code, §§ 6020, 6041.)

Executed on the _____ day of _____, 192—, by delivering a copy of the within warrant (or *notice*) to D. D. in person (or to W. J., the wife or son or daughter or other person, found at the usual place of abode of the said D. D., he not being found there, the said W. J., being a member of his family and above the age of sixteen years.

X. Y., Constable (or *sheriff* or *sergeant*).

Though the statute (§ 2825) requires the officer to state the "manner" of service yet the usual practice is believed to be sufficient of the officer merely to endorse and sign, "Executed on the _____ day of _____, 192—." But not so, where the service is on a corporation.

NO. 17. RETURN ON WARRANT OR OTHER PROCESS OR NOTICE SERVED ON
INDIVIDUAL BY POSTING AT HIS RESIDENCE.

(*Idem.*)

Executed on the _____ day of _____, 192—, by leaving a copy of the within process (or *notice*) posted at the front door of the usual place of abode of D. D., neither he nor any other member of his family above sixteen years of age being found there.

X. Y., constable (or *sheriff* or *sergeant*).

NO. 18. SUBPOENA FOR WITNESSES.

(Code, § 6021.)

Virginia, _____ county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

You are hereby commanded to summon A. B., B. C. and C. E. to appear at _____, in said county, on the _____ day of _____, 192—, at _____ a. m. (or *p. m.*), before me or such other justice as may then be there, to testify in behalf of P. P., in a warrant then and there to be tried between the said P. P., plaintiff, and D. D., defendant. Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

NO. 19. AFFIDAVIT BY DEFENDANT FOR ASSOCIATION OF OTHER MAGIS-
TRATES WITH TRIAL JUSTICE.

(Code, § 6022.)

To worshipful J. T., Justice of _____ county:

I, D. D., who am summoned to appear before J. T., a justice of _____ county, on the _____ day of _____, 192—, to answer the claim of P. P. in debt (or *damages*, or *detinue* or *trover* and *conversion*, as the case may be), do hereby ask that the said J. T. shall associate with himself two other justices of the peace of said county, who, together with the said J. T., shall try the said case. This the _____ day of _____ 192—.

D. D.

An oral application would probably be sufficient, but a written application might sometimes be better.

No. 20. JUDGMENT IN DETINUE.

(Code, §§ 6022-3.)

P. P.

v.

In Detinue.

D. D.

At ———, in ——— county, on ——— day of ———, 192—:

Judgment is that the plaintiff recover of the defendant the cow (or other property) in the warrant mentioned, of the value of ——— dollars, and also the sum of ——— dollars for the damages sustained by the wrongful detention of the said property, and ——— dollars for his costs.

J. T., J. P.

No. 21. JUDGMENT IN TROVER.

(*Idem.*)

P. P.

v.

In Trover.

D. D.

At ———, in ——— county, on ——— day of ———, 192—:

Judgment that the plaintiff recover of the defendant ——— dollars, with interest from the ——— day of ———, 192—, till paid, and (or other property) in the warrant mentioned, and ——— dollars for his costs.

J. T., J. P.

No. 22. JUDGMENT IN DEBT OR DAMAGES.

(*Idem.*)

P. P.

v.

In Debt (or *Damages*).

D. D.

At ———, in ——— county, on ——— day of ———, 192—:

Judgment that the plaintiff recover of the defendant ——— dollars, with interest from the ——— day of ———, 192—, till paid; and ——— dollars for his costs.

J. T., J. P.

In a proper case, insert immediately after the word "Judgment," "upon an instrument waiving the homestead," or "upon a claim against which the homestead cannot be demanded."

No. 23. INDORSEMENT OF APPEAL TO COURT.

(Code, § 6027.)

P. P.

v.

In Detinue (or *Trover, Debt or Damages*).

D. D.

——— county, to-wit:

The said D. D. (or P. P.) having prayed an appeal from my

judgment in this cause, and tendered S. S. as his surety, who thereupon undertook, as surety, for the payment of such judgment as may be rendered on appeal by the appellate court against the defendant and all costs and damages (or *all costs and damages* merely, if the recovery be for costs only) an appeal from my said judgment is granted the said defendant (or *plaintiff*) to the circuit court of said county. Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 24. STAY OF EXECUTION.

(*Idem.*)

P. P.

v.

In Debt (or *Damages*).

D. D.

Judgment having been rendered in this cause against the defendant and for _____ dollars, exclusive of interest and costs, and he having requested stay of execution thereon, whereupon S. S. undertook, as the surety of the said defendant, for the payment of the said judgment, execution thereon is stayed for _____ days from its date (40, 60 or 90 days, according as judgment is for a sum over \$10 and not exceeding \$20, over \$20 and not exceeding \$30, or over \$30). This _____ day of _____, 192—.

J. T., J. P.

No. 25. WRIT OF POSSESSION IN DETINUE.

(Code, § 6029.)

Virginia, _____ county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

These are to command you to cause P. P. to have possession of [here state the property as in the judgment], which he has recovered before me against D. D.

You are also commanded that of the goods and chattels, current money, and bank notes of the said D. D., in your county, you cause to be made _____ dollars, which to the said P. P. were at the same time adjudged for his damages sustained by the wrongful detention of the said cow (or other property) by the said D. D., and _____ dollars, which were then also adjudged to the said P. P. for his costs in prosecuting his said warrant.

And make true return before me, of the day and manner, of executing this writ. Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 26. EXECUTION IN DETINUE.

(Code, §§ 6029-30.)

Virginia, _____ county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

These are to command you that of the goods and chattels, current

money and bank notes of D. D., in your county, you cause to be made the sum of ——— dollars, which P. P. has recovered before me, in a warrant in detinue for the value of a certain cow (or other property), and also ——— dollars, for his damages sustained by the wrongful detention thereof by the said D. D., and ——— dollars, which were adjudged to the said P. P. for his costs in prosecuting his said warrant. Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

No. 27. EXECUTION IN TROVER.

(*Idem.*)

Virginia, ——— county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

These are to command you that of the goods and chattels, current money and bank notes of D. D., in your county, you cause to be made the sum of ——— dollars, which P. P. has recovered before me, in a warrant in trover and conversion, for his damages sustained by the wrongful conversion by the said D. D. of a certain cow (or other property), the goods and chattels of the said P. P., and ——— dollars, which were adjudged to the said P. P. for his costs in prosecuting his said warrant; and how you shall have executed this writ, make true return before me, within sixty days from the date hereof. Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

No. 28. EXECUTION IN DEBT OR DAMAGES.

(*Idem.*)

Virginia, ——— county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

These are to command you that of the goods and chattels, current money and bank notes of D. D., in your county, you cause to be made the sum of ——— dollars, with interest thereon from the ——— day of ———, 192—, till paid, which P. P. has recovered before me in a warrant in debt (or *damages*), against the said D. D., and also the sum of ——— dollars, which were adjudged to the said P. P. for his costs in prosecuting his said warrant.

And how you shall have executed this writ, make true return before me, within sixty days from the date hereof. Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

No. 29. EXECUTION AGAINST ADMINISTRATOR OR EXECUTOR.

(*Idem.*)

Virginia, ——— county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

These are to command you that of the goods and chattels, current

money and bank notes of D. D., deceased, in the hands of A. E., administrator (or *executor*) of the said D. D., deceased, to be administered, you cause to be made, in your county, the sum of _____ dollars, with interest thereon from the _____ day of _____, 192—, till paid, which P. P. has recovered before me, in a warrant in debt (or *damages*) against the said A. E., as administrator (or *executor*) of the said D. D., deceased, and also _____ dollars, which were adjudged to the said P. P. for his costs in prosecuting his said warrant.

And how you shall have executed this writ, make true return before me, within sixty days from the date hereof. Given under my hand, this _____ day of _____, 192—.

J. J., J. P.

This form, it is hoped, will enable the justice to frame any process for or against an administrator or executor.

No. 30. SUMMONS AGAINST GARNISHEE.

(Code, §§ 6509-13.)

Virginia, _____ county, to-wit:

To X. Y., constable of said county:

Whereas P. P. has recovered before me, J. T., a justice of said county, a judgment against D. D. for the sum of _____ dollars, with interest thereon from the _____ day of _____, 192—, till paid, and _____ dollars for costs; upon which judgment a writ of *feri facias*, on _____ day of _____, 192—, was issued against the goods and chattels, current money and bank notes of the said D. D., and placed in the hands of X. Y., constable (or *sheriff*) of said county; and whereas the said P. P. has this day suggested that, by reason of the lien of the said writ of *feri facias*, there is a liability on one G. G.,

These are, therefore, to command you to summon the said D. D., as well as the said G. G., to appear at _____, in said county (being also within the district wherein the defendant resides), on the _____ day of _____, 192—, at _____ a. m. (or *p. m.*), before me (or *J. S.*), a justice of said county, to answer to the said suggestion. And then and there make return of this summons. Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 31. JUDGMENT AGAINST GARNISHEE.

(*Idem.*)

P. P., Plaintiff,
v.
D. D., defendant,
G. G., garnishee.

} Upon Suggestion.

At _____, in _____ county, on _____ day of _____, 192:

It appearing that G. G., garnishee, is indebted to D. D., defendant, in the sum of _____ dollars, judgment is that the plaintiff, P. P., re-

cover of the said G. G. the sum of ——— dollars, with interest from the ——— day of ———, 192—, till paid, and ——— dollars for his costs (but omit as to costs, if the garnishee owe not enough to pay judgment and costs).

In case of *property* in hands of granishee, say instead: "It appearing that G. G., garnishee, has in his possession a horse (or other property) belonging to the said D. D., it is hereby ordered that X. Y., constable (or *sheriff*) of ——— county, do take and sell the said horse, according to law, and out of the proceeds of said sale pay to the said P. P. his judgment, and return any surplus to the said D. D."

No. 32. INDEMNIFYING BOND. --

[See *Bonds*, No. 4.]

No. 33. FORTHCOMING BOND.

[See *Bonds*, No. 13.]

No. 34. NOTICE OF SALE OF PROPERTY LEVIED ON.

(Code, §§ 2831-33.)

NOTICE!

On the ——— day of ———, 192—, between 10 a. m. and 3 p. m. of that day, at ———, in ——— county, I shall sell to the highest bidder, for cash, to satisfy an execution (or *distress warrant*) in my hands in favor of P. P. against D. D., the following property, to-wit: [here describe the property]. This ——— day of ———, 192—.

X. Y., constable (or *sheriff*) of ——— county.

No. 35. NOTICE TO TRY APPEAL.

(Code, § 6039.)

To Mr. D. D.:

Take notice, that on the ——— day of ———, 192—, that being the ——— day of the ——— term, 192—, of the circuit court of ——— county, I shall move the said court to try your appeal from the judgment of J. T., a justice of said county, rendered, on a warrant for a small claim, in my favor against you, on the ——— day of ———, 192—. This ——— day of ———, 192—.

P. P., by his attorney.

NO. 36. APPLICATION TO JUSTICE FOR WARRANT OF INTERPLEADER BY CLAIMANT OF PROPERTY LEVIED ON OR DISTRAINED.

(Code, § 6035.)

To J. T., a justice of ——— county:

The petition of C. C. represents that an execution awarded by you (or *by J. S., a justice of ——— county*) on a judgment rendered by you (or *by him*), in a warrant, in favor of P. P. against D. D., for the sum of ——— dollars, has been levied on [here describe the property] by X. Y., a constable (or *the sheriff*) of said county, who has advertised the same to be sold on the ——— day of ———, 192—, to satisfy the said execution; that the said property belongs to your petitioner and is now claimed by him [or *that the said property is claimed by one C. C.*], and that the same is not of greater value than \$20, and ought not to be sold to satisfy the said execution:

Your petitioner therefore asks you to award him a summons against the said P. P. and D. D., returnable in not less than five days from the date thereof, to show cause why the said property should not be discharged from the said levy. This ——— day of ———, 192—.

C. C., claimant (*officer or plaintiff*).

In case of a *distress warrant*, insert "a distress warrant awarded by you (or *J. S.*), a justice of said county," for "an execution awarded * * * on a warrant," and "distress warrant" for "execution," wherever it occurs.

This application, though not required to be in writing, should be, that being the better practice. Either the claimant, the plaintiff in the execution or distress warrant, or the officer making the levy, may make the application.

NO. 37. AFFIDAVIT THAT PROPERTY IS NOT OF GREATER VALUE THAN \$20, TO BE ENDORSED ON THE PETITION.

(*Idem.*)

Virginia, ——— county, to-wit:

This day, C. C. personally appeared before me, J. T., a justice of said county, and made oath that to the best of the said affiant's belief, the property levied on, under the within named execution, is not of greater value than \$20. Given under my hand, this the ——— day of ———, 192—.

J. T., J. P.

The person filing the above affidavit, may now be either the claimant, the plaintiff in the execution or distress warrant, or the officer making the levy.

NO. 38. WARRANT OF INTERPLEADER BY A JUSTICE TO TRY TITLE OF
PROPERTY LEVIED ON OR DISTRAINED.

(*Idem.*)

Virginia, ——— county, to-wit:

To X. Y., constable of said county

Whereas it appears to me, J. T., a justice of said county, by the application of C. C., that an execution awarded by me (or *by J. S., a justice of said county*), on a judgment rendered by me (or *by him*) on a warrant, in favor of P. P. against D. D., has been levied on [here describe the property] by X. Y., a constable (or *the sheriff*) of said county, and that the said property is now advertised to be sold by the said constable (or *sheriff*) on the ——— day of ———, 192—, to satisfy the said execution; and whereas the said C. D. claims the said property as his, and avers that the same is not liable to said execution, and it appearing by the affidavit of the said C. C. (or P. P. or X. Y.), that the said property is not of greater value than \$20.

These are, therefore, to command you to summon both the said P. P. and D. D. to appear before me at ———, in said county, on the ——— day of ———, 192—, at ——— a. m. (or *p. m.*), to show cause why the said property should not be discharged from the said levy. Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

Supply here first paragraph of note under No. 34.

NO. 39. ENDORSEMENT ON WARRANT OF POSTPONEMENT OF SALE.

(*Idem.*)

I do require that the sale of the within mentioned property, taken to satisfy the within mentioned execution, be postponed until after the ——— day of ———, 192—, (*i. e.*, after the return day of the warrant). This ——— day of ———, 192—.

J. T., J. P.

NO. 40. JUDGMENT ON WARRANT OF INTERPLEADER.

(*Idem.*)

C. C., plaintiff,

v.

Warrant of Interpleader.

P. P. and D. D., defendants.

At ———, in ——— county, on ——— day of ———, 192—.

Upon a hearing I do adjudge that the [here describe the property], mentioned in the within warrant, is not (or *is*, as the case may be), liable to the within-mentioned execution (or *distress warrant*) levied on the same, and I do, therefore, order X. Y., constable of said county, to deliver the said property to the said C. C. (or to sell the said property to satisfy the said execution or *distress war-*

rant); and I do, moreover, adjudge that the said P. P. (or C. C.) pay to the said C. C. (or P. P.) the sum of _____ dollars, for his costs by him expended in prosecuting (or *defending*) the said summons. Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 41. APPEAL IN CASE OF INTERPLEADER.

[See No. 23, above.]

No. 42. NOTICE TO APPEAL IN CASE OF INTERPLEADER.

[See No. 33, above.]

II. ATTACHMENTS

(I) ATTACHMENTS TRIABLE BY A JUSTICE

- § 1. Jurisdiction and grounds
- § 2. How attachment obtained
- § 3. Where and when attachment obtained
- § 4. Against what estate; how directed, served, returnable, and tried
- § 5. Garnishment in attachment cases
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- § 7. Bonds in attachment cases
 - (1) Attachment bond
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- § 8. Service or levy of attachment
- § 9. Lien of attachment
- § 10. Who may defend attachment
- § 11. What defense may be made; when attachment to be dismissed
- § 12. Where a third person claims the property or an interest therein or lien thereof
- § 13. Amendments in attachment
- § 14. Judgment in attachment
- § 15. Rehearing for non-resident defendant
- § 16. Appeal
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(II) ATTACHMENTS ISSUED BY A JUSTICE OR CLERK AND RETURNABLE TO COURT

- § 1. In what cases justice or clerk may issue attachments returnable to court

- § 2. Jurisdiction of courts; venue; pleadings
- § 3. Who may sue out an attachment
- § 4. Grounds of attachment
- § 5. Petition for attachment; what to state; must be sworn to; who may be made defendants, garnishees, etc.
- § 6. Other provisions as to attachments
- § 7. Various forms under "Attachments Issued by a Justice or Clerk and Returnable to Court"

A justice in some cases may issue and try attachments, and in others he issues them and returns them to court for trial.

ATTACHMENTS TRIABLE BY A JUSTICE

§ 1. **Jurisdiction and grounds.**—Where a due claim (other than for a personal injury) does not exceed \$20 (exclusive of interest), a justice may, upon proper petition, issue and try an attachment in the three cases enumerated below, where the principal defendant or one of the principal defendants—

(1) Is a foreign corporation, or a non-resident of the State, and has estate, debts, or lien owing to it or him, within the county or corporation;

(2) Is removing or about to remove out of the State, with intent to change his domicile, or permanent residence (see *Domicile and Residence*);

(3) Is removing, intends to remove, or has removed the specific property claimed, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this State, so that there probably will not be therein effects sufficient to satisfy the claim, when judgment is obtained therefor, should only the ordinary process of law be used to obtain the judgment (Code, §§ 6415, 6379.)

Likewise, a justice, upon proper affidavit (a petition is not required in this case), where the claim is less than \$20, may issue and try an attachment, where a tenant liable for rent payable within a year, intends to remove, is removing, or has within thirty days removed, his effects from the leased premises otherwise than in the usual course of trade, so that there will not be left on the premises property liable to distress sufficient to pay the rent. In this case any goods liable to distress for rent, as well as any goods liable for the debt, may

be attached. The attachment should also summon the defendant to answer the attachment. (Code, §§ 6418, 6416.)

§ 2. How attachment obtained.—How an attachment is obtained upon a petition, for the particulars of which see div. (II.), section 5, below.

An attachment for rent is obtained in the old way of complaint on oath (Code, §§ 6416, 6418).

§ 3. Where and when attachment obtained.—An attachment may issue in the county or city where the cause of action arose or where the principal defendant has estate or debts owing to him. (Code, § 6381.)

An attachment may issue or be executed on a Sunday if oath be made that the defendant on that day is actually removing his effects or is removing or about to remove out of this State with intent to change his domicile (Code, § 6392).

§ 4. Against what estate; how directed, served, returnable, and tried.—The attachment may be against the specific property (if any) claimed, or, if the claim be not for specific property, against the estate of the defendants, and is directed to the sheriff, sergeant, or constable of any county or corporation, and made returnable before the justice issuing the attachment, or some other justice of the same county or corporation, and thereupon such proceedings may be had before the justice as would, if the claim exceeded \$20 (exclusive of interest), be had before a court, except that the proceedings shall in all cases be without formal pleadings, and the trial shall be without a jury. The attachment may be served on a corporation as process and notice may be served under sections 6063 and 6064 (sec. 8, below). If the attachment is levied on real estate it must be removed by the justice to court. All bonds are to be filed with the clerk. (Code, § 6415-6386.)

§ 5. Garnishment in attachment cases.—

(1) *Proceedings against defendant for debts, etc., admitted to be due; when debtor may claim exemption out of amount due.*—By section 6398 of the Code: "A defendant, who, at the time of service of the attachment, was alleged to be indebted to a principal defendant, or had in his possession personal property belonging to such principal defendant, shall appear in person and submit to an examination on oath touching such debt or personal property, or he may, with

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the consent of the court, file an answer in writing under oath, stating whether or not he was so indebted, and if so, the amount thereof and the time of maturity, or whether he had in his possession any personal property belonging to said principal defendant and if so, the nature and value thereof. If it appear on such examination or by his answer that at the time of the service of the attachment, he was indebted to the principal defendant, or had in his possession or control any goods, chattels, money, securities or other effects belonging to the said defendant, the court may order him to pay the amount so owing by him, or to deliver such effects to the sheriff, sergeant, or other person designated by the court to receive the same, or such defendant may, with the leave of the court give bond with sufficient security, payable to such person and in such penalty as the court shall prescribe, with condition to pay the amount owing by him, and have such effects forthcoming, at such time and place as the court may thereafter require, but the principal defendant, if a householder or head of a family, may claim that the amount so found owing from his co-defendant, or the personal property in his possession, shall be exempt from liability for the plaintiff's claim; and if it shall appear that the principal defendant is entitled to such exemption, then the court shall render a judgment against the defendant answering only for the excess, if any, beyond the exemption to which the principal defendant is entitled. An answer under oath under this section shall be deemed *prima facie* to be true."

(2) *If a defendant indebted to, or having effects of the principal defendant fail to appear what court may do.*—By section 6399: "If the attachment be served on a defendant who the petition alleges is indebted to, or has in his possession effects of, the principal defendant, and he fail to appear, the court may either compel him to appear, or hear proof of any debt owing by him, or of effects in his hands belonging to said defendant in such attachment, and make such orders in relation thereto as if what is so proved had appeared on his examination."

(3) *When plaintiff suggests that a defendant has not fully disclosed the debts owing by him, etc., how court to ascertain same.*—By section 6400.—"When it is suggested by

the plaintiff in any attachment that a co-defendant has not fully disclosed the debts owing by him, or effects in his hands belonging to the principal defendant in such attachment, the court, without any formal pleading, shall inquire as to such debts and effects, or, if either party demand it, shall cause a jury to be impaneled for that purpose, and proceed in respect to any such found by the court or the jury, in the same manner as if they had been confessed by such co-defendant. If the judgment of the court or verdict of the jury be in favor of such co-defendant, he shall have judgment for his costs against the plaintiff."

§ 6. Exemptions from attachment and garnishment.—

In attachment, or garnishment, as in executions, one should note the following exemptions:

(1) The "homestead exemption," which the defendant may claim and set apart in real or personal property, or both, amounting to \$2,000 (Code, §§ 6531-2).

(2) The "poor debtor's exemption", or certain necessary articles for housekeeping or farming specified in the statute, amounting to some \$500 (Code, §§ 6552-3).

(3) The "laboring man's exemption," not exceeding \$50 per month, which cannot be evaded by sending the claim into another state for collection (Code, §§ 6555-7).

(4) The wages of a minor is not liable to garnishment or otherwise liable to the payment of debts of parents (Code, § 6558).

For when defendant may claim exemption out of amount due from garnishee, see section 5, (1), above.

The wages and salaries of officers, clerks, employees, holding their office by city, town, or county authority, whether by election or appointment, and who receive compensation for their service from the monies of such city, town or county, are liable to garnishment or execution, unless exempt under the above heads (Code, §§ 6560-1). And the wages and salaries of State employees (but not of State officers) are likewise subject to garnishment or execution (Code, § 6559).

See, also, *Homestead and other Exemptions*.

§ 7. Bonds in attachment cases.—

(1) *Attachment bond*.—If the officers take possession of the property attached, the plaintiff must give an attachment

bond, with condition to pay all costs and damages which may be awarded against him, or sustained by any person, by reason of his suing out the attachment. (Code, §§ 6384, 6414.) Also, a bond is required of the plaintiff when the defendant makes affidavit of a substantial defense. If not given, the attachment stands dismissed. (Code, § 6385.)

(2) *Indemnifying bond*.—If a doubt arise whether the property is liable to attachment, the plaintiff must give an indemnifying bond, with condition to indemnify the officer against all damages which he may sustain in consequence of the seizure or sale of the property and to pay any claimant of such property all damage which he may sustain in consequence of such seizure or sale, and also to warrant and defend to any purchaser of the property such estate or interest therein as is sold; but if the property is in the possession of the defendant and some other person claims it, no indemnifying bond is required, and the officer proceeds to execute the attachment, unless the claimant gives a suspending bond and proceeds within thirty days thereafter to have the title to the property tried by an interpleader. (Code, § 6154.)

(3) *Forthcoming and replevy bonds*.—The defendant may regain possession of the property by giving a forthcoming bond, with condition to have the property forthcoming at such time and place as the court or justice may require; or, instead, he may release the property from the attachment by giving a replevy bond with condition to perform the judgment of the court or justice. (Code, §§ 6394-5, 6414.)

(4) *Appeal bond*.—When appeal given, property is to be delivered to the owner (Code, § 6413).

§ 8. Service or levy of attachment.—An attachment is levied in the case of tangible personal property, as at common law (see "Warrants for Small Claims", div. I., section 14, (6), above); or by service of a copy on the person having possession, if bond required upon affidavit of substantial defense has been given; otherwise by taking possession; in cases of garnishees, by delivery of a copy; in the case of real estate, by an endorsement of the levy on the attachment describing the real estate, and serving the attachment on the person, if any, in possession. It may be served as a notice may be served under sections 6041 and 6063-4 of the Code—see *Notice*. (Code, § 6390.)

Where an officer has in his possession money or effects of the defendant held under another attachment or other process, the attachment is levied by delivering a copy to him. (Code, § 6408.)

In a case triable by a justice, no order of publication is necessary, but if the defendant cannot be served with the attachment it shall be posted at two or more public places in the county or city in which the attachment is sued out, at least ten days before judgment or sale. (Code, § 6415.)

The officer's return should show the time of day, date, and manner of service on each person and parcel of property, with a list and description of the property taken (Code, § 6391).

§ 9. Lien of attachment.—The plaintiff has a lien from the time of the service or levy of the attachment, in respect to personal property in possession (actual or constructive) of the defendant, and personal property, bonds, notes, accounts, and other choses in action or securities in the hands of or owing by a co-defendant or garnishee; and from the date of the attachment, in respect to the real estate mentioned in the endorsement on the attachment or summons, as prescribed in section 8, above; but a holder in due course of negotiable paper has priority over an attachment levied thereon. (Code, § 6393.)

"When any attachment is sued out although the property or estate attached be not replevied as aforesaid, the interest and profits thereof pending the attachment and before judgment, may be paid to the defendant, if the court deem it proper." (Code, § 6396.)

Attachment liens are void as to subsequent *bona fide* purchasers (including creditors secured by deed of trust or mortgage) for value and without actual notice, until it is duly docketed and indexed (Code, § 6469).

§ 10. Who may defend attachment.—Any defendant or garnishee, or party to a forthcoming bond or the officer, or any person claiming the property or an interest therein or lien thereon, may make defense (Code, § 6402). The garnishee may make any defense against the plaintiff which he might make against the defendant.

§ 11. What defense may be made; when attachment to be dismissed.—

(1) *What defense may be made.*—By section 6403 of the Code: "Any defendant may show that the court is without jurisdiction to hear and determine the controversy.

"The principal defendant, if not served with process, may appear specially and show that the attachment was issued on false suggestion or without sufficient cause, in which event the attachment shall be quashed.

"Any person claiming title to, an interest in, or a lien upon the property attached, or any part thereof, after being admitted as a party defendant, if not already a defendant, and the principal defendant, may contest the liability of the principal defendant for the petitioner's claim, in whole or in part, by proof of any matter which would constitute a good defense by the principal defendant to an action at law on such claim, and may also show that the attachment was issued on false suggestion, or without sufficient cause. The principal defendant may also file set-offs as in action at law.

"Other defendants shall be limited to defenses personal to themselves, or which may prevent a liability upon them or their property.

"The court in which an attachment is pending, or the judge of such court in vacation may, either before, or at any time after, an attachment has been returned, on motion of the principal defendant, or any defendant claiming title to, an interest in, or a lien upon the property attached, or any part thereof, after reasonable notice to the attaching creditor, hear testimony and quash the attachment, if of opinion that the attachment is invalid on its face, or was issued on false suggestion, or without sufficient cause. When the attachment is properly sued out, and the case is heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant. In either case, he shall recover his costs, and there shall be an order for the restoration of the attached effects."

(2) *When attachment to be dismissed.*—By section 6404: "If the principal defendant has not appeared generally, nor been served with process, and the sole ground of jurisdiction of the court is the right to sue out the attachment, and this

right be decided against the petitioner, the petition shall be dismissed at the costs of the petitioner; but if the plaintiff's claim be due at the hearing, and the court would otherwise have jurisdiction of an action against such defendant for the cause set forth in the petition, and said defendant has appeared generally, or been served with process, it shall retain the cause and proceed to final judgment in like manner as if it had been a motion matured for hearing under section 6046"—see *Motions for Money*.

§ 12. Where a third person claims the property or an interest therein or lien thereon.—Such person may file a petition by way of an interpleader setting up his claim, upon giving security for cost, which claim will be first tried by the court or justice; or the plaintiff may make such parties co-defendants in his original petition—see div. (II.), section 5, below. (Code, § 6407.)

§ 13. Amendments in attachment.—By section 6409 of the Code: "Such amendments shall be allowed of the petition, answer, grounds of defense, and of any of the other proceedings in the attachment as shall be conducive to the attainment of the ends of substantial justice, and upon such terms as to continuance and costs as may seem proper. The amendment when made, shall, as against the principal defendant, and as to claims against him existing at the time the attachment was issued, relate back to the time of the levy of the attachment, unless otherwise directed. No attachment shall be quashed or dismissed for mere formal defects."

§ 14. Judgment in attachment.—See Code, §§ 6405-6.

§ 15. Rehearing for non-resident defendant.—See Code, §§ 6411-12.

§ 16. Appeal.—Perhaps an appeal lies as in the case of a warrant for a small claim (Code, §§ 6415, 6027, 6036-7).

§ 17. Various forms under "Attachments Triable by a Justice."

No. 1. PETITION FOR ATTACHMENT TRIABLE BY A JUSTICE.

(Code, §§ 6415, 6383.)

To worshipful J. T., a Justice of the Peace for the County or City) of _____:

[Follow the petition below, for attachment returnable to court,

(div. (II), No. 1), and state one or more of only the first three grounds of attachment.]

No. 2. ATTACHMENT TRIABLE BY A JUSTICE.

(*Idem.*)

[Follow the attachment below, returnable to court, (div. (II), No. 2), and make it returnable before a justice instead of the court.]

No. 3. COMPLAINT FOR ATTACHMENT AGAINST TENANT REMOVING EFFECTS FROM LEASED PREMISES.

(Code, §§ 6416-18.)

_____ county, to-wit:

This day P. P. (or A. T., *agent or attorney for P. P.*) has personally appeared before me, J. T., a justice of said county, in the state of Virginia, and made complaint on oath, to the best of affiant's belief, that D. D. is his tenant, and is liable to him for rent of a [here designate the premises leased], in the sum of _____ dollars (or *in the _____ part of the crops and produce of said premises, of the estimated value of _____ dollars*), payable within one year, to-wit: [if the rent is payable in money, state when each portion of the rent falls due within the year]; and that the said D. D. intends to remove (or *is removing or has, within thirty days last past, removed*) his effects from the leased premises aforesaid otherwise than in the usual course of trade; and that there is not (or *that unless an attachment issues there will not be left*) on such premises property liable to distress sufficient to satisfy the rent so to become payable. Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 4. ATTACHMENT AGAINST TENANT REMOVING EFFECTS FROM LEASED PREMISES.

(*Idem.*)

Virginia, _____ county, to-wit:

To X. Y., sheriff (or *constable*) of _____ county:

Whereas P. P. (or A. T., *agent or attorney for P. P.*) has this day personally appeared before me, J. T., a justice of _____ county, and made complaint on oath, to the best of affiant's belief that [and so on, as in the complaint];

These are, therefore, in the name of the Commonwealth, to require you to attach such goods of the said D. D. or his assignee, or under tenant, as might be distrained for the said rent, if it had become payable, and any other estate, personal or real, of the said D. D., or so much thereof as is sufficient to satisfy to the said P. P. the rent aforesaid, and to make return hereof at _____, in said county,

on the ——— day of ——— 192—, at ——— a. m. (or p. m.) before me or such other justice of said county as may then be there to try this attachment (or to the next ——— term of the circuit court of said county, if the claim exceed \$20). And you are furthermore required to summon the said D. D. to answer this attachment. Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

For endorsement to be made upon attachment or for certificate, when attachment bond is given and officer is to take possession, see note under attachment bond, No. 5, below.

No. 5. ATTACHMENT BOND.

(Code, §§ 6384, 6414.)

Know all men by these presents, that we, P. P. (or other person) and S. S., are held and firmly bound unto D. D. (the defendant) in the just and full sum of ——— dollars, to the payment whereof well and truly to be made to the said D. D., we bind ourselves, jointly and severally, firmly by these presents; and we hereby severally waive our homestead exemptions as to this obligation. Witness our hands and seals, this ——— day of ———, 192—.

Yet upon this condition, that whereas, J. T. a justice of ——— county, did, on the ——— day of ———, 192—; on the complaint on oath of P. P., made in due form of law, issue an attachment in favor of the said D. D., for the sum of ——— dollars (or *against a certain cow detained by the said D. D., of the value of ——— dollars, or if the said cow cannot be found, then against the estate of the said D. D., for ——— dollars, the value of the said cow, and ——— dollars damages for detention of same*); which said attachment is returnable at ———, in said county, on the ——— day of ———, 192—, before the said J. T., or such other justice of said county as may then be there to try the said attachment (or to the next ——— term of the circuit court of said county):

Now if the said P. P. will pay all costs and damages which may be awarded against him or sustained by any person by reason of his suing out the said attachment, then this obligation is to be void, otherwise to remain in full force and virtue.

P. P. [L. s.]

S. S. [L. s.]

When the bond is given, endorse upon the attachment or certify as follows: "The plaintiff in the within attachment (or *the attachment of P. P. against D. D., issued by me on the ——— day of ———, 192—*), has given bond with security approved by me in the penalty of ——— dollars, with condition to pay all costs and damages which may be awarded against him or sustained by any person by

reason of his suing out the said attachment. Given under my hand, this _____ day of _____, 192—.

J. T., J. P."

No. 6. **AFFIDAVIT BY DEFENDANT OF SUBSTANTIAL DEFENSE TO ATTACHMENT.**

(Code, § 6385; and Revisors' Note thereto.)

I, D. D. (or A. T., *agent* or *attorney* for D. D.) do solemnly swear (or *affirm*) that the said D. D. has a substantial defense to the merits of the claim of P. P., the plaintiff, in the attachment against me issued by the clerk of the circuit (or *corporation*) court of the county (or *city*) of _____ (or *issued by J. T., a justice of the peace for _____ county or city*), on the _____ day of _____, 192—, the said attachment being returnable to the circuit court (or *corporation*) court of the county (or *city*) of _____. This, the _____ day of _____, 192—.

D. D. (or A. T., *Agent* or *Atty.* for D. D.)

Virginia, _____ county, to-wit:

Sworn to by D. D. (or A. T., *agent* or *attorney* for D. D.) before N. T., a notary public for said county, this the _____ day of _____, 192—, in my county and state aforesaid.

N. T., N. P.

No. 7. **BOND BY PLAINTIFF WHERE DEFENDANT MAKES AFFIDAVIT OF SUBSTANTIAL DEFENSE.**

(Code, § 6385; and Revisors' Note thereto.)

[Follow No. 5, above, to the condition, and say:]

Yet upon this condition that whereas the said D. D. (or A. T., *agent* or *attorney* for D. D.) has filed in the clerk's office of the circuit (or *corporation*) court of _____ county (or *city*) an affidavit that he has a substantial defense to the merits of the plaintiff's claim, in a certain attachment issued for him by the clerk of the said court (or *by J. T., a justice of the peace for said county (or city)*), on the _____ day of _____, 192—, and returnable to the said court; Now if the said P. P. will prosecute his said attachment with diligence, and the said P. P. and S. S. will pay all costs and damages which may be awarded against the said P. P., or sustained by the said D. D., or any other person, by reason of suing out the said attachment, then this obligation is to be void, otherwise to remain in full force and virtue.

P. P. (SEAL.)

S. S. (SEAL.)

No. 8. **INDEMNIFYING BOND.**

[See No. 4, under *Bonds*.]

No. 9. FORTHCOMING BOND OR REPLEVY BOND.

(Code, §§ 6394-5, 6414.)

[See No. 12, under *Bonds*.]

No. 10. RETURN OF AN OFFICER ON AN ATTACHMENT.

(Code, §§ 6390-1.)

By virtue of the within attachment, I levied the same on the ——— day of ———, 192—, at ——— a. m. (or p. m.), on the following goods and chattels, of the defendant, D. D., then found in his possession, to-wit: [here describe them], by delivering a copy of the said attachment to the said D. D. in person [or "by delivering a copy of the said attachment and giving information of its purport to J. N., the wife (or a member of the family) of the said D. D., the said J. N. being above the age of sixteen years and found at the usual place of abode of the said D. D., he himself not being found there;" or "by leaving a copy of the said attachment at the front door of the place of abode of the said D. D., there being no person there upon whom service could otherwise be made"]; and no attachment bond having been given by the plaintiff, or by anyone for him, I did not take the goods and chattels aforesaid into my possession [or and the said P. P. (or other person) *having given an attachment bond, took the goods and chattels aforesaid into my possession*; and if a forthcoming bond is given, add instead, "*and the said D. D. having given a forthcoming bond, I returned them to his possession*"; or if a replevy bond is given, add instead, "*and the said D. D., having given a replevy bond, I released the goods and chattels aforesaid from the said attachment*"].

[In case of a garnishee, continue thus: And I also levied the said attachment on the debts then due by G. G. to the said D. D. and other effects in the hands of the said G. G. then belonging to the said D. D. by delivering a copy of the said attachment, to the said G. G. in person (or by either of the above modes of service, as the case may be).]

X. Y., constable (or *sheriff, or deputy for J. R. sheriff*) of ——— county.

If the attachment be against a corporation, insert after the first bracket, "by delivering a copy of the said attachment to P. A.," and continue as in case of return of service on a corporation, under *Corporations* section 17, Nos. 28 and 29.

No. 11. JUDGMENT ON ATTACHMENT FOR SPECIFIC PROPERTY.

(Code, §§ 6415, 2981-2.)

P. P. {
vs. { On Attachment for Specific Property.
D. D. {

At ———, in ——— county, on ——— day of ———, 192—.

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Upon hearing, judgment is rendered that the plaintiff recover of the defendant the cow in the attachment mentioned, and _____ dollars for his costs; and it is ordered that X. Y., constable (or *sheriff*) of said county, deliver the said cow to the plaintiff.

J. T., J. P.

If the cow *has not been found*, say: "Judgment is that the plaintiff recover of the defendant _____ dollars, the value of the cow in the attachment mentioned, and _____ dollars for his costs; and it is ordered that X. Y., constable (or *sheriff*) of said county, do make sale of so much of the estate of the said D. D., attached in his hands, as may be necessary, and out of the proceeds of said sale pay the said P. P. the said several amounts, aggregating _____ dollars, and that he return any surplus estate or money to the said D. D."

No. 12. JUDGMENT ON ATTACHMENT IN DEBT OR DAMAGES.

(*Idem.*)

P. P. }
 vs. }
D. D. } On Attachment in Debt (or *Damages*).

At _____, in _____ county, on _____ day of _____, 192—:

Upon hearing, judgment is that the plaintiff recover of the defendant the sum of _____ dollars, with interest from the _____ day of _____, 192—, till paid, and X. Y., constable (or *sheriff*) of said county, do make sale, according to law of so much of the attached effects in his hands as may be necessary, and out of the proceeds of said sale pay to the said P. P. the said amount and costs, and that he return any surplus effects or money to the said D. D.

J. T., J. P.

In a proper case, insert immediately after the words, "judgment," this, "upon an instrument waiving the homestead; or upon a claim against which the homestead cannot be demanded." (Code, § 6551.)

No. 13. JUDGMENT ON ATTACHMENT WHERE GARNISHEE IS SUMMONED.

(Code, §§ 6398-6400, 6383, 6415.)

P. P., plaintiff, }
 v. }
D. D., defendant, }
and G. G. garni- } On Attachment and Garnishment.
shee, }

At _____, in _____ county, on _____ day of _____, 192—.

Upon hearing, judgment is that the said P. P. recover of the said D. D., the sum of _____ dollars, with interest from the _____ day of _____, 192—, till paid, and _____ dollars for his costs; and it

appearing that the said G. G., who has been garnished in this case, is indebted to said D. D. in the sum of _____ dollars, judgment is that the said P. P. recover from the said G. G., the sum of _____ dollars, with interest from the _____ day of _____, 192—, till paid, and _____ dollars for his costs (but omit as to costs if the garnishee owe not enough to pay judgment and costs).

J. T., J. P.

In case of *property* in hands of garnishee, instead of "and it appearing," &c., say: "And it appearing that G. G., who has been garnished in this case, has in his possession a horse belonging to the said D. D., it is hereby ordered that X. Y., constable (or *sheriff*) of said county, do take and sell the said horse, according to law, and out of the proceeds of said sale pay to the said P. P. his said judgment against the said D. D., and return any surplus to the said D. D.

NO. 14. PETITION OF THIRD PERSON CLAIMING THE PROPERTY.

(Code, §§ 6407, 6415.)

To J. P., a justice of _____ county:

The petition of C. C. represents that an attachment awarded by you in favor of P. P. against the estate of D. D. for the sum of _____ dollars has been levied on [here describe the property] by X. Y., constable (or *sheriff*) of said county; that the said property is not subject to the said attachment, and that the said levy is not valid; that the said property belongs to your petitioner, and is now claimed by him (or *that your petitioner has an interest in or lien on said property*, stating the nature of such interest or lien) and, being ready to give security for cost according to law, your petitioner prays that you award a summons against both the said P. P. and D. D. to answer my said claim. This _____ day of _____, 192—. C. C.

From this petition a summons may easily be framed, noting the form No. 36 under the head of "Warrants for Small Claims," div. I., above. For *judgment* on hearing, see No. 38, thereunder.

(II) ATTACHMENTS ISSUED BY A JUSTICE OR CLERK AND
RETURNABLE TO COURT

§ 1. In what cases justice or clerk may issue attachments returnable to court.—A justice or the clerk of the court, may issue an attachment in all cases, whether the claim is due or not, when the amount in controversy exceeds \$20, and make it returnable to court, except where the claim is not due and the only ground of attachment is being a foreign corporation

or a non-resident, and having estate or debts owing where the attachment issues (Code, §§ 6378, 6383, 6386, 6416-17).

§ 2. Jurisdiction of courts; venue; pleadings.—(See Code, §§ 6380-2.)

§ 3. Who may sue out an attachment.—“Any person having a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be due and payable or not, or to damages for breach of any contract, express or implied, or to damages for a wrong.” (Code, § 6378.)

§ 4. Grounds of attachment.—Section 6379 of the Code provides: “The following shall be sufficient grounds for an attachment; that the principal defendant or one of the principal defendants:

First. Is a foreign corporation, or is not a resident of this State, and has estate or debts owing to said defendant within the county or city in which the attachment is, or that said defendant being a non-resident of this State, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or city in which the attachment is. The word (estate) as herein used, shall include all rights or interests of a pecuniary nature which can be protected, enforced, or proceeded against in courts of law or equity; or,

Second. Is removing or is about to remove out of this State, with intent to change his domicile (see *Domicile and Residence*); or,

Third. That the said debtor intends to remove, or is removing, or has removed the specific property sued for, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this State, so that there will probably not be therein effects of such debtor sufficient to satisfy the claim when judgment is obtained therefor, should only the ordinary process of law be used to obtain the judgment; or,

Fourth. Is converting, or is about to convert, or has converted his property of whatever kind, or some part thereof, into money, securities, or evidences of debt, with intent to hinder, delay, or defraud his creditors; or,

Fifth. Has assigned or disposed of, or is about to assign

or dispose of, his estate, or some part thereof, with intent to hinder, delay, or defraud his creditors; or,

Sixth. Has absconded, or is about to abscond from the State, or has concealed himself therein to the injury of his creditors, or is a fugitive from justice.

The intent mentioned in clauses four and five above may be stated either in the alternative or conjunctive.

For attachment against a tenant removing his effects from the leased premises, see sections 6416-17 of the Code.

§ 5. Petition for attachment; what to state; must be sworn to; who may be made defendants; garnishees, etc.—Section 6383 of the Code provides: "Every attachment, except an attachment for rent, shall be commenced by a petition filed in the clerk's office, whether the court be in session or not, or before a justice of the county or city in which venue is given by section sixty-three hundred and eighty-one. If it is sought to recover specific personal property the petition shall state the nature and estimated value thereof, the character of estate therein claimed by the plaintiff, and what sum, if any, the plaintiff claims he is entitled to recover for its detention. If it is sought to recover a debt or damages for a breach of contract express or implied, or damages for a wrong, the petition shall set forth the plaintiff's claim with such certainty as will give the adverse party reasonable notice of the particulars thereof, and shall state a sum certain which, at the least, the plaintiff is entitled to, or ought to recover, and if the claim be for a debt not then due and payable, at what time or times the same will become due and payable. The certainty required of the notice under section 6046 of this Code shall be sufficient for a petition under this section. The petition shall also set forth the existence of one or more of the grounds of attachment mentioned in section 6379, and shall ask for an attachment against the specific personal property mentioned in the petition, or against the estate, real and personal, of one or more of the principal defendants, or against both the specific personal property and the estate of such defendants, real or personal.

The person or persons against whom the plaintiff is asserting the claim shall be made defendant or defendants to

said petition, and shall be known as the principal defendant. There shall also be made defendants any person indebted to or having in his possession property, real or personal, belonging to a principal defendant, which is sought to be attached. There may also be made defendants any person claiming title to, an interest in, or a lien upon the property sought to be attached. The petition shall be sworn to by the plaintiff or his agent, or some person cognizant of the facts therein stated. The defendants, other than the principal defendant or defendants, shall be known as co-defendants."

In case of rent, the attachment issues on sworn complaint as formerly (Code, § 6416).

§ 6. Other provisions as to attachments.—For other provisions as to attachments, see sections 6384 to 6417 of the Code, and "Attachments Triable by a Justice," division (I), above, commencing with section 3.

§ 7. Various forms under "Attachments issued by a Justice or Clerk and Returnable to Court."

No. 1. PETITION FOR ATTACHMENT TO BE ISSUED BY A CLERK OR JUSTICE AND RETURNABLE TO COURT.

(Va. Code 1919, §§ 6383-4, and Revisors' Note thereto.)

Hon E. L., Judge of the Circuit Court of _____ County (or Circuit or City Court of the City of _____); or (To Worshipful I. T., a Justice of the Peace for the County (or City) of _____):

Your petitioner, P. P., would respectfully represent unto your Honor as follows:

That he has a just claim against D. D. for (in the case of specific personal property, say, *one bay horse* (or other property), of the value of _____ dollars, the absolute estate of the said P. P., and _____ dollars for the detention or conversion of the same) the sum of _____ dollars due by account filed herewith (or by note or bond of the said D. D., dated _____, 192—, and payable _____, 192—, with interest thereon from _____, 192—; or damages for breach of contract (stating what or its date, if written); or damages for a wrong done the said P. P., as follows: (state the facts briefly, as, for killing the plaintiff's hog, or for other wrong to person or property).

Your petitioner further represents that the said D. D. (here state one or more of the six several grounds of attachment, as follows:)

(1) Is a foreign corporation (or is a non-resident of this State), and has estate and debts owing to the said D. D. (or being a non-resident of this State, is entitled to the benefit of a lien on property) within the said county (or city); or

(2) Is removing or is about to remove out of this State with intent to change his domicile; or

(3) Intends to remove, or is removing (or *has removed*) his (*said horse and his*) estate and the proceeds of the sale of his property or a material part thereof out of this State, so there will probably not be therein effects of said D. D. sufficient to satisfy the said claim when judgment is obtained therefor, should only the ordinary process of law be used to obtain the judgment; or

(4) Is converting and is about to convert and has converted his property, or some part thereof, into money, securities, or evidences of debt, with intent to hinder, delay, or defraud his creditors; or

(5) Has assigned and disposed of, and is about to assign and dispose of, his estate or some part thereof, with intent to hinder, delay, or defraud his creditors; or

(6) Has absconded or is about to abscond from the State (or *has concealed himself in the State to the injury of his creditors or is a fugitive from justice*).

Your petitioner would also represent and suggest that G. G. is indebted to and has in his possession property, real and personal, belonging to the said D. D.; and that C. I. claims title to, an interest in, or a lien upon some of the property sought to be attached. ,

Your petitioner, therefore, asks that the clerk of the said court (or *your worship*) issue forthwith an attachment against (*the said horse and*) so much of the lands, tenements, goods, chattels, moneys and effects of the said D. D. not exempt from execution as will be sufficient to satisfy the said demand of the said P. P., and in case of tangible personal property, taken possession of upon the said P. P.'s giving bond according to law, safely to keep the same in his possession to satisfy any judgment that may be recovered by the said P. P. in said attachment. And that the said D. D. be summoned to appear on the ——— day of the ——— term, 192—, that being the ——— day of the said term, of the circuit (or *corporation*) court of said county (or *city*) (or *before some justice of said county or city*) and answer this petition, or state his ground of defense thereto: also that the said G. G. be summoned and required to appear at said time and place and disclose upon oath the debts owing by him or effects in his hands belonging to the said D. D., or, in case the court consent thereto, file an answer in writing under oath stating whether or not he was so indebted to the said D. D. at the time of the service of the attachment upon him, and if so, the amount thereof and the time of maturity, or whether he had in his possession any personal property belonging to the said D. D., and, if so, the nature and value thereof; furthermore, that the said C. I. be summoned to appear at said time and place and set up his claim of title to, interest in, or lien upon any of the property sought to be attached hereby.

Respectfully,

A. T., Attorney for P. P.

Virginia, County (or City) of ———, to-wit:

Sworn to by P. P. (or A. G., *agent for P. P.*, or by some other person cognizant of the facts therein stated), before N. T., a notary

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public for said county (or city), this the _____ day of _____, 192—, in my county (or city) and state aforesaid.

N. T., N. P.

NO. 2. ATTACHMENT TO BE ISSUED BY A CLERK OF JUSTICE AND RETURNABLE TO COURT.

(Va. Code 1919, §§ 6383-4, 6386; and Revisors' Note thereto.)

THE COMMONWEALTH OF VIRGINIA,

To X. Y., Sheriff (*Constable or Sergeant*) of the County (or City) of _____,

Greeting:

Whereas P. P. has filed in the clerk's office of our circuit (or corporation) court of the county (or city) of _____ (or *whereas P. P. has filed before me, J. T., a justice of the peace for said county or city*), a petition against D. D., sworn to according to law, alleging that he has a just claim against the said D. D. for (in the case of specific personal property say, *one bay horse* (or other property) *of the value of _____ dollars the absolute estate of the said P. P., and _____ dollars for the detention or conversion of the same*) the sum of _____ dollars due by account filed therewith (or *by note or bond of the said D. D., dated _____, 192—, and payable _____, 192— with interest thereon from _____, 192—; or damages for breach of contract* (stating what for, or its date, if written); or *damages for a wrong done the said P. P., as follows: (State the facts briefly, as, for killing the plaintiff's hog, or for other wrong to his person or property); and alleging the following grounds of attachment against the said D. D.: (Here state the several grounds set out in the petition); and also suggesting that G. G. is indebted to and has in his possession property, real and personal, belonging to the said D. D., and that C. I. claims title to, an interest in, or a lien upon some of the property sought to be attached.*

Therefore, we command you that you forthwith attach (*the said horse or the like, in case of specific property, and*) so much of the lands, etc., (following the petition to the end).

WITNESS, C. C., clerk of our said circuit (or corporation) court, this the _____ day of _____, 192—, in the year of our Lord 192—, and the _____ year of our foundation (or *given under my hand, this the _____ day of _____, 192—, where a justice issues it*).

TESTE:

C. C., Clerk (or J. T., J. P.)

NO. 3. NOTICE OF MOTION TO QUASH ATTACHMENT BEFORE CIRCUIT JUDGE IN VACATION.

(Code, § 6403.)

To Mr. P. P.:

Take notice that on the _____ day of _____, 192—, at _____, Va., in _____ county, I shall move before the honorable R. T., judge of the circuit court for said county, in vacation, to quash a certain

attachment, issued by the clerk of the said court, on the — day of —, 192—, in favor of P. P., against the effects and estate of D. D., for the sum of — dollars, because the said attachment is invalid on its face, and was issued on false suggestions and without sufficient cause. This — day of —, 192—.

D. D., by his attorney.

Nos. 4-14 [For other forms, see Nos. 3 to 14, under "Attachments Triable by a Justice," div. (I), above, the forms being *practically* the same here as there.]

III. UNLAWFUL DETAINER BEFORE A JUSTICE

(For procedure in court, see *Unlawful Entry or Detainer* elsewhere in this book. Also see *Forcible Entry or Detainer*.)

- § 1. Jurisdiction
- § 2. Service of the summons; when and where returnable; plea of defendant; how case tried
- § 3. How summons directed and served
- § 4. When possession is unlawfully detained
 - (1) Tenancy from year to year or from month to month, etc.; how terminated
 - (2) Tenancy at will; how terminated
 - (3) Tenancy by sufferance; how terminated
 - (4) Where tenant of city, or town, or suburban or residential property, fails to pay rent
- § 5. Verdict and judgment
- § 6. Writ of possession
- § 7. Appeal; security when defendant appeals
- § 8. Chapter as to "Warrants for Small Claims" applicable to "Unlawful Detainer"
- § 9. Various forms under "Unlawful Detainer"

§ 1. **Jurisdiction.**—By section 5445 of the Code: "In any case where the possession of any house, land or tenement is unlawfully detained by a tenant or some person claiming under him the lease of such tenant being originally for a period not exceeding one year or for the time such tenant is employed by the landlord as laborer, the landlord, or other person entitled to the possession may present to any justice of the county, city or town in which said premises are situated, a statement, under oath, of the facts which authorize the removal of the tenant or other person in possession (describing said premises), and thereupon the said justice shall issue summons against the person or persons named in said affidavit."

The case may be removed to court before trial—see section 8, below.

§ 2. Service of the summons; when and where returnable; plea; how case tried; its procedure.—Section 5446 of the Code provides: "When issued by a justice, it may be returned to and the case heard and determined by any justice of said county, city, or town: Provided, the same be made returnable to some place within the magisterial district, city or town in which the defendant resides. Such summons shall be served at least five days before the return day thereof. If the defendant appear and plead, his plea shall be 'not guilty.' Upon this issue, or upon the return of the first or any subsequent summons 'executed,' the court or justice, as the case may be, shall try whether he unlawfully withholds the premises in controversy. * * * Such causes shall have precedence over all other civil causes on the docket."

§ 3. How summons directed and served.—"The summons issued by a justice may be directed to the sheriff, sergeant or any constable, and served in the same manner as the process issued from the court." (Code, § 5447.) See *Process*.

§ 4. When possession is unlawfully obtained.—Possession is unlawful either where it is unlawfully obtained, or where lawful possession has been terminated. This latter may be either where the lease has expired, or where the lease or tenancy has been terminated by notice or otherwise. This leads us to discuss tenancy from year to year, or from month to month, tenancy at will, and tenancy by sufferance, and how terminated, and how tenancy in city or town is terminated where tenant is in default in payment of rent.

(1) *Tenancy from year to year or from month to month, etc.; how terminated.*—Every general letting, if the lessor accepts yearly rent, or rent measured by 1-12, 1-6, 1-4, 1-3, or 1-2 part of twelve months, if not expressed to be a tenancy at will, is a tenancy from year to year. Hence where a tenant for years holds over, and the lessor receives rents from him, he becomes thereby a tenant from year to year. And while a verbal lease exceeding five years (which is void) and entry in pursuance thereof, makes a tenancy at will until rent is paid, when that is done it becomes a tenancy from year to year, subject to the terms of the verbal agreement. And, upon like principles, there may be a lease from month to month or from week to week, when the lease indicates such a holding. (1 M's Real Prop., §§ 390, etc.)

As to notice to terminate such tenancies, section 5516 of the Code provides: "A tenancy from year to year may be terminated by either party giving notice, in writing, prior to the end of any year, for three months if it be of land within, and for six months, if of land without a city or town, of his intention to terminate the same. A tenancy from month to month may be terminated by either party giving thirty days' notice, in writing, prior to the end of the month, of his intention to terminate the same. When such notice is to the tenant, it may be served upon him, or upon any one holding under him the leased premises, or any part thereof. When it is by the tenant, it may be served upon any one who, at the time, owns the premises in whole or in part, or the agent of such owner, or according to the common law. This section shall not apply where, by special agreement, no notice is to be given; nor shall notice be necessary from or to a tenant whose term is to end at a certain time."

By section 5517 of the Code (added by the Revisors), "A tenant from year to year, month to month or other definite term, shall not, by his mere failure to vacate the premises upon the expiration of the lease, be held as tenant for another term when such failure is not due to his wilfulness, negligence or other avoidable cause, but such tenant shall be liable to the lessor for use and occupation of the premises and also for any loss or damage sustained by the lessor because of such failure to surrender possession at the time stipulated."

(2) *Tenancy at will; how terminated.*—A tenancy at will is where lands or tenements are let by one man to another, to hold at the will of both parties, by force of which lease the lessee is in possession. This may be not only by expressed lease, but may be by the mere construction of law, as where one enters by the consent of the owner of land, under a verbal promise of a conveyance in fee, or under a written contract of purchase, with the terms whereof he has failed to comply, or in case of a mortgagor remaining in possession of the premises mortgaged, without any stipulation that he may hold until default; or generally, whenever one is let into possession of lands by the consent of the owner, without having a freehold interest, or any certain term, or an estate from year to year.

A tenancy at will may be terminated by either party even though it be expressly provided otherwise; and this may be either express, by declaring on the land or giving reasonable notice, that he shall or will hold no longer; or by implication, as by the exercise of any act of ownership, or by the death of either party. (1 M's Real Prop., §§ 377, etc.)

(3) *Tenancy by sufferance; how terminated.*—A tenancy by sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all—e. g., where one takes a lease for a year or other period, and after the same has expired continues to hold without any fresh lease, which, however, will be implied; but if the lessor receive rent, the tenancy is then from year to year. A tenancy by sufferance may be terminated by a demand of possession, or by any other act declaring the holding to be tortuous, or unlawful. (1 M's Real Prop., §§ 386, etc.)

(4) *Where tenant of city or town, or suburban or residential property, fails to pay rent.*—Section 5448 of the Code provides: "If any tenant or lessee of premises in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or premises anywhere used for residential purposes, and not for farming or agriculture, being in default in the payment of rent, shall so continue for five days after notice in writing requiring possession of the premises, or the payment of rent, such tenant or lessee shall thereby forfeit his right to his possession. In such case, the possession of the defendant may, at the option of the landlord or lessor, be deemed unlawful, and he may proceed to recover the same in the manner provided by this chapter [as to unlawful detainer]."

Notice may be served as provided in section 6041 of the Code—see *Notice*.

§ 5. Verdict and judgment.—Section 5447 of the Code says: "If it appear that the plaintiff was forcibly or unlawfully turned out of possession, or that it was unlawfully detained from him, unless it also appear that the defendant has unlawfully held or detained the possession for three years before the date of the summons, the verdict or judgment shall be for the plaintiff for the said premises, or such part thereof as may be found to have been so held or detained. When

part only of the premises is found for the plaintiff, the verdict or judgment shall describe the part so found. In such cases the verdict or judgment shall be for the plaintiff. If the verdict be for the defendant as to the whole, judgment shall be for him."

Unlike other cases, no judgment is rendered in this action by default; but there must be evidence that the defendant unlawfully withheld the possession at the date of the summons—i. e., that he had forcibly or unlawfully turned the plaintiff out of possession, or then unlawfully detained it from him. This action is designed to protect the actual possession, whether rightful or wrongful. Thus, possession gained by one entitled thereto is unlawful, if forcible; and possession gained by any other person is unlawful, whether forcible or not; and if the possession be thus unlawfully acquired, the person so turned out of possession may recover it, without any regard to his right of possession, and it is sufficient that he had possession under claim of title, and was not a mere squatter or intruder.

Indeed, by section 5450: "No such judgment shall bar any action of trespass or ejectment between the same parties, nor shall any such judgment or verdict be conclusive, in any such future action, of the facts therein found."

As to extent of possession, when one has actual possession of part of tract of land under a *bona fide* claim and color of title to the whole, it is possession of the whole, or so much thereof as is not in the adverse possession of others; otherwise, his possession is confined to what he occupies, cultivates, or encloses. As to evidence involving the location of reservations within the exterior boundaries of grants, or other conveyances, see section 5465 of the Code.

§ 6. Writ of possession.—By section 6483 of the Code, on a judgment for the recovery of real estate, a writ of possession may issue therefor, which shall conform to the judgment as to the description of the property the possession whereof is recovered, and there may also be issued a writ of *feri facias* for the damages or profits and costs.

In the summons, so in the judgment, the premises should be described with reasonable certainty; indeed, the plaintiff, if otherwise entitled to recover, may recover according to the

description in the summons or in his lease, or such part as the verdict may find. He must then, at his peril, point out to the officer the premises of which he is to be given possession; for if he takes more than he has recovered in action, the court will interfere in a summary way, and compel him to make restitution.

Where the premises are in a city or town or in suburban or other lands which are subdivided into building lots for residential purposes, the writ of possession is to be made returnable within 30 days (Code, § 6483).

If the officer, executing a writ of possession, "finds the premises locked, he may, after declaring at the door the cause of his coming and demanding to have the door opened, employ reasonable and necessary force to break and enter the door and put the plaintiff in possession. And an officer having a writ of possession for specific personal property, if he find locked or fastened the building or place wherein he has reasonable cause to believe the property specified in the writ is located, may in the day time, after notice to the defendant, his agent or bailee, break and enter such building or place for the purpose of executing such writ." (Code, § 6483.)

§ 7. Appeal; security when defendant appeals.—Section 5449 of the Code provides: "An appeal shall lie from the judgment of a justice, in any proceedings under this chapter, to the circuit court of the county or corporation court of the corporation in which the premises are situated, in the same manner and with like effect and upon like security, as appeals taken under chapter 250 [as to 'warrants for small claims']. The said appeal shall be taken within ten days, and the security approved by the justice from whose decision the appeal is taken; and when the appeal is taken by the defendant he shall be required to give security also for all rent which has accrued upon said premises and which may accrue thereon, but for not more than one year's rent in all, whether it shall have accrued before or may accrue after said appeal is taken, and also for all damages that shall have accrued or may accrue from the unlawful use and occupation of the premises for a period not exceeding three months. Upon the trial of said appeal, a jury may be impaneled to try the matter in controversy, upon the application of either party."

§ 8. Chapter as to "Warrants for Small Claims" applicable to "unlawful Detainer".—In section 6015 of the Code, conferring jurisdiction as to warrants for small claims, the Revisors add: "Justices shall also have jurisdiction of actions of unlawful entry or detainer in cases provided by section 4445."

So that section 6017 as to removal of cases to court before trial, and other provisions of the chapter not in conflict with that as to unlawful detainer and adaptable to such cases, would seem to apply to unlawful detainer cases.

§ 9. Various forms under "Unlawful Detainer."—

No. 1. AFFIDAVIT FOR SUMMONS IN UNLAWFUL DETAINER.

(Code, § 5445.)

I, P. P., do solemnly swear (or *affirm*) that [here state the facts authorizing the tenant's removal, and describe the premises], and that, therefore, as I verily believe, the said D. D. unlawfully detains and withholds from me the possession of the said premises, the lease whereof to the said D. E. being originally for a period not exceeding one year (or *for the time the said D. D. remained employed by the said P. P. as laborer*). This ——— day of ———, 192—.

P. P.

——— county, to-wit:

Sworn to by the above P. P., before me, in my said county, this ——— day of ———, 192—.

J. T., J. P. (or other proper officer).

No. 2. SUMMONS IN UNLAWFUL DETAINER.

(*Idem.*)

Virginia, ——— county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

You are commanded, in the name of the Commonwealth, to summon D. D. to appear at ———, in said county, on the ——— day of ———, 192—, at ——— a. m. (or *p. m.*), before me, or such other justice of said county as may then be there to try this case, to answer the complaint of P. P., made upon oath, that the said D. D. is in possession and unlawfully detains and withholds from him, the said P. P., the possession of a certain [here describe the premises], situated in said county, the lease whereof to the said D. D. being originally for a period not exceeding one year (or *for the time the said D. D. remained employed by the said P. P. as laborer*); and have then and there this writ.

Given under my hand and seal, this ——— day of ———, 192—.

J. T., J. P.

NO. 3. SUBPOENA FOR WITNESS.

[See *Warrants for Small Claims*, div. I., above.]

NO. 4. RULE AGAINST WITNESS FOR NON-ATTENDANCE.

[See title *Contempts*.]

NO. 5. JUDGMENT IN UNLAWFUL DETAINER.

(Code, §§ 5447, 3525.)

P. P. }
v. } In Unlawful Detainer.
D. D. }

At ———, in ——— county, on ——— day of ———, 192—:

Judgment is that the plaintiff recover of the defendant possession of [here describe the premises as in the warrant] and ——— dollars for his costs in prosecuting his summons in unlawful detainer.

J. T., J. P.

NO. 6. EXECUTION FOR COSTS.

(Code, §§ 3525, 6483.)

Virginia, ——— county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

These are to command you that of the goods and chattels, current money, and bank notes of D. D., in your county, you cause to be made the sum of ——— dollars, which P. P. has recovered before me, for his costs in prosecuting his summons in unlawful detainer against the said D. D.

And how you shall have executed this writ, make due return before me, within sixty days from the date hereof. Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

NO. 7. ENDORSEMENT OF APPEAL TO COURT.

(Code, § 5449.)

[See *Warrants for Small Claims*, div. I., above.]

NO. 8. ENDORSEMENT OF APPEAL BY TO DEFENDANT TO COURT.

(*Idem.*)

P. P. }
v. } In Unlawful Detainer.
D. D. }

——— county, to-wit:

The said D. D. having prayed an appeal from my judgment in

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this cause, and tendered S. S. as his surety, who thereupon undertook, as his surety, for the payment of all rent which has accrued upon the premises in controversy, and which may accrue thereon, but for not more than one year's rent in all, and also of all damages that have accrued, or may accrue, from the unlawful use and occupation of the premises for a period not exceeding three months, and of all costs in the said judgment be affirmed, an appeal from my said judgment is granted the said D. D. to the circuit court of said county.

J. T., J. P.

NO. 9. NOTICE TO TRY APPEAL.

(*Idem.*)

[See Warrants for Small Claims, div. I., above, substituting "summons in lawful detainer" for "warrant for small claim."]

NO. 10. NOTICE TO TENANT IN CITY OF TOWN TO PAY RENT OR GIVE POSSESSION.

(Code, § 5448.)

To Mr. T. T.:

You are hereby notified to pay to me, within five days from sight hereof, ——— dollars, the amount of rent for which you are in default, and are now due me as my tenant and lessee of the premises you now occupy, or else to deliver up to me the said premises without delay. This ——— day of ———, 192—.

L. L.

NO. 11. NOTICE BY LANDLORD TO TERMINATE TENANCY FROM YEAR TO YEAR OR FROM MONTH TO MONTH.

(Code, § 5516.)

To Mr. T. T.:

You are hereby notified to quit and deliver up to me or my assigns (or *L. L., whose agent I am, or his assigns*) on the ——— day of ———, 192—, [the end of the year or next month of the tenancy], the possession of the messuage or dwelling-house (or rooms and apartments, or farm, lands and premises) with the appurtenances, situated in ——— county, which you now hold, or claim to hold, of me (or of the said *L. L.*). This ——— day of ———, 192—.

L. L. (or A. T., agent for L. L.).

NO. 12. NOTICE BY TENANT TO TERMINATE TENANCY FROM YEAR TO YEAR OR FROM MONTH TO MONTH.

(*Idem.*)

To Mr. L. L.:

You are hereby notified that on the ——— day of ———, 192—,

[the end of the year or next month of the tenancy], I shall quit and deliver up the possession of the messuage or dwelling-house (or rooms and apartments, or farm, lands and premises), situated in _____ county, with the appurtenances, which I now occupy and which you may insist I hold of you. This _____ day of _____, 192—. T. T.

No. 13. AFFIDAVIT OF SERVICE OF NOTICE ON MEMBER OF FAMILY OR BY POSTING AT FRONT DOOR

(Code, § 6041.)

Executed on the _____ day of _____, 192—, by delivering a true copy of the within notice and giving information of its purport to J. J. the wife (or *a member of the family*) of D. D., the said J. J. being above the age of sixteen years and found at the usual place of abode of the said D. D., he himself not being found there.

OR

Executed on the _____ day of _____, 192—, by leaving a true copy of the within notice posted at the front door of the usual place of abode of D. D., neither he nor any other person being there upon whom legal service could be made.

Pulaski county, to-wit:

Subscribed and sworn to by P. P., before me, in my said county, this _____ day of _____, 192—.

J. T., J. P. (or N. P. or other proper officer).

IV. DISTRESS WARRANT

(See Burks' Pleading & Practice (new ed.).)

- § 1. Who may recover rent; who liable for it
 - (1) Who may recover rent
 - (2) Who is liable for rent
- § 2. When and by whom distress made
- § 3. On what goods levied
- § 4. When goods not to be removed without paying a year's rent; lien for taxes, levies and militia fines not affected
- § 5. When goods of an under-tenant may be removed from leased premises
- § 6. When officer may enter by force to levy distress or attachment
- § 7. When distress not unlawful because of irregularity, etc.
- § 8. Return of distress warrants; process of sale thereunder
- § 9. Remedy, when rent is to be paid in other thing than money
- § 10. Safe-keeping and sale of property levied on
- § 11. How tenant may prevent sale, and defend warrant
- § 12. Various forms under "Distress Warrant"

§ 1. Who may recover rent; who liable for it.—By sec-

tion 5519 of the Code, "Rent of every kind may be recovered by distress or action."

(1) *Who may recover rent.*—By statute, he to whom rent is due, his executor, administrator, or assignee, may recover rent; but rent accruing after the lessor's death, if he had an estate in fee, is recoverable by his heir or devisee; if he had only a lease or term himself, the rent is recoverable by his administrator or executor. If the lessor convey away or assign his estate or term, or the rent thereafter to fall due thereon, his purchaser or assignee may recover such rent. (Code, § 5520.)

(2) *Who is liable for rent.*—By section 5521: "Rent may be recovered from the lessee or other person owing it, or his assignee, or the personal representative of either; but no assignee is to be liable for rent which became due before his interest began. Nothing herein shall impair or change the liability of heirs or devisees for rent, as for other debts of their ancestor or devisor."

§ 2. When and by whom distress made.—By section 5522 of the Code: "Rent may be distrained for within five years from the time it comes due, and not afterwards, whether the lease be ended or not. The distress shall be made by a constable, sheriff or sergeant, of the county or corporation wherein the premises yielding the rent, or some part thereof, may be, or the goods liable to distress may be found, under warrant from a justice, founded upon an affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed." Taking a judgment (not so, a bond) merges the right to distress in the superior right to issue execution.

§ 3. On what goods levied.—By section 5523 of the Code, as amended by Acts 1922: "The distress may be levied on any goods of the lessee, or his assignee, or under-tenant, found on the premises, or which may have been removed therefrom not more than 30 days. A levy within such 30 days shall have like effect as if the goods levied on had not been removed from the leased premises. If the goods of such lessee, assignee, or under-tenant, when carried on the prem-

ises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, or within thirty days thereafter, they shall be liable to distress, but for not more than 6 months' rent, whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section, nor shall the goods of the under-tenant be liable to a greater amount than such under-tenant owed the tenant at the time the distress was levied."

The following goods are not liable to distress for rent: (1) Milk and other things perishable within ten days (4 M. 106); (2) Growing crops prior to certain periods (Code, § 2830, and *Sheriffs, Sergeants, etc.*, § 13.); (3) Probably things in the personal possession and use of the tenant, as otherwise the peace would be endangered (4 M. 106); (4) The tools of a man's trade—e. g., the books of a scholar and, *a fortiori*, of a lawyer, and the like (4 M. 107); (5) Goods in the custody of the law—e. g., those taken in execution, even though they be left in possession of the tenant, but only until the day of sale is elapsed (4 M. 108); (6) Property exempt under the "poor man's law" and "laboring man's law"—see Code, §§ 6552, 6555; but not property claimed under the homestead law (Code, § 6531).

§ 4. When goods not to be removed without paying 6 months' rent; lien for taxes, levies, and militia fines not affected.—By section 5524, as amended by Acts 1922: "If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, or the said goods be sold, the party having such lien, or the purchaser of such goods, may remove them from the premises on the following terms, and not otherwise, that is to say: on the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being more altogether than 6 months' rent in any case. If the goods be taken under legal process, the officer executing it shall out of the proceeds of the goods, make such payment

of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines."

§ 5. When goods of an under-tenant may be removed from leased premises.—By section 5525, as amended by Acts 1922: "The preceding section is subject to the following limitations: An under-tenant, or a purchaser from him, or a creditor holding a deed of trust, mortgage, or other encumbrance created on his goods after they were carried on the leased premises, may remove the same upon payment of so much of the rent contracted to be paid by him as is in arrear, and securing the residue, not exceeding 6 months' rent; and if the goods be taken under legal process against him, the officer executing the same shall, out of the proceeds of his goods, make payment of so much of the rent as to which he is in arrear, and as to what is to become due from him, shall sell sufficient of the goods upon credit until then, taking from the purchasers bonds with good security, payable to the party entitled to receive the same, and deliver them to him. Provided that nothing contained in this act shall apply to farm lands that are rented for agricultural purposes."

§ 6. When officer may enter by force to levy distress or attachment.—By section 5526 of the Code: "The officer having such distress warrant, or any attachment for rent, if there be need for it, may, in the day time break open and enter into any house or closet in which there may be goods liable to the distress or attachment, and may, either in the day or night break open and enter into any house or closet wherein there may be any goods so liable which have been fraudulently or clandestinely removed from the demised premises. He may also levy such distress warrant or attachment on property liable for the rent found in the personal possession of the party liable therefor."

§ 7. When distress not unlawful because of irregularity, &c.—By section 5527 of the Code: "Where distress shall be

made for rent justly due, and any irregularity or unlawful act shall be afterward done by the party distraining, or his agent, the distress itself shall not be deemed to be unlawful, nor the party making it be therefore deemed a trespasser *ab initio* (i. e., from the beginning); but the party aggrieved by such irregularity or unlawful act may, by action, recover full satisfaction for the special damage he shall have sustained thereby."

§ 8. Return of distress warrants; process of sale thereunder.—By section 5528 of the Code: "It shall be the duty of each officer who under the present law may execute warrants of distress except where it is otherwise provided by law to make return of his action and proceedings upon such warrants as may be placed in his hands for collection, and file the same with the clerk of the circuit or corporation court of his county or city, as the case may be, within 60 days after the same may have come to his hands. Upon the return of such warrant it shall be the duty of such clerk to enter the same upon the execution book of his office after the manner as now provided by law as to executions issued by justices and returned unsatisfied, and the said clerk shall preserve such warrant in his office as is now provided as to such unsatisfied executions. If such return shall show that a levy has been made and that property levied on remains unsold it shall be lawful for the said clerk of the circuit or corporation court, as the case may be, in whose office such return is filed, to issue a writ of *venditioni exponas* thereon just as if the said return were upon a writ of *feri facias*"—see section 6493 of the Code.

§ 9. Remedy, when rent is to be paid in other thing than money.—By section 5529 of the Code: "Where goods are distrained or attached for rent reserved in a share of the crop, or in any thing other than money, the claimant of the rent, having given the tenant ten days' notice, or, if he be out of the county, having set up the notice in some conspicuous place on the premises, may apply to the court to which the attachment is returnable, or the circuit court of the county or the corporation court of the corporation in which the distress is made, to ascertain the value in money of the rent reserved, and to order a sale of the goods distrained or attached. The tenant may make the same defenses that he could to a

motion on a forfeited forthcoming bond given for rent, and may also contest the value of what was reserved for the rent. The court shall ascertain, either by its own judgment, or, if either party require it, by the verdict of a jury impaneled without the formality of pleading, the extent of the liability of the tenant for rent, and the value in money of such rent, and if the tenant has been served with notice shall enter judgment against him for the amount so ascertained. It shall also order the goods distrained or attached, or so much thereof as may be necessary, to be sold to pay the amount so ascertained. The officer charged with the execution of such warrant or attachment shall make return thereof to the clerk's office of the court, showing how he has executed the same. If the goods so directed to be sold prove insufficient to pay the amount of the rent so ascertained, an execution may be issued on said judgment as in case of other judgments, which may be levied on such property as would be leviable under an execution issued on a judgment in an action brought to recover the rent."

§ 10. Safe-keeping and sale of property levied on.—

The same procedure is had as in case of executions—see *Warrants for Small Claims*, div. I., section 8, above.

§ 11. How tenant may prevent sale, and defend warrant.

—The tenant may give a bond, for the forthcoming of the property at the day and place of sale, and thus retain possession of the property (Code, § 3617). If he is unable to give the forthcoming bond, if he will make oath to that fact and that he has a valid defense to the distress warrant, the officer returns the warrant to court, leaving the tenant in possession. But the officer may retake the property upon proper indemnifying bond being given by the landlord. The landlord may then give ten days' notice of a motion for judgment and sale. If the property is perishable or expensive to keep, the court or judge may order it sold. (Code, § 6519.)

If the tenant wishes to make defense on the ground that the distress was for rent not due in whole or in part, or was otherwise illegal (Code, § 6522), he purposely forfeits his forthcoming bond by failure to produce the property at the time and place of sale, and the said bond is returned to court, for procedure thereon by action or motion, in court,

or by motion before a justice, in which case the tenant makes his defense as above stated. (Code, §§ 6520-1, 6527.) See *Forthcoming Bond*.

§ 12. Various forms under "Distress Warrants."—

No. 1. AFFIDAVIT FOR WARRANT OF DISTRESS FOR RENT.

(Code, § 5522.)

I, P. P. (or A. T., *agent for P. P.*), do solemnly swear (or *affirm*) that I verily believe that the sum of ——— dollars is now justly due me (or *the said P. P.*) from D. D., for rent reserved upon contract for a certain messuage and tenement (or *in the ——— part of the crops and produce of certain lands*), situate in ——— county. This ——— day of ———, 192—.

P. P. (or A. T., *agent for P. P.*)

——— county, to-wit:

Sworn to by the above P. P. (or A. T.), before me, in my said county, this ——— day of ———, 192—.

J. T., J. P. (or N. P., or other proper officer).

No. 2. WARRANT OF DISTRESS FOR RENT.

(*Idem.*)

Virginia, ——— county, to-wit:

To X. Y., constable (or *sheriff*) of said county:

Whereas, P. P. (or A. T., *agent for P. P.*), has made (or *produced*) before me, J. P., a justice for said county, an affidavit, made in due form of law, that the affiant verily believes that [and so on as in the affidavit]:

These are, therefore, in the name of the Commonwealth, to require you forthwith to distrain so much of the goods and chattels of the said D. D., on the said premises, or which have been removed therefrom not more than thirty days, as shall be sufficient to satisfy the rent due and in arrear as aforesaid, and the costs distress, and make return of your action and proceedings upon such warrant, and file the same with the clerk of the circuit court of said county within sixty days from the time this warrant comes to your hands [or instead of "and make return of your action, &c.," say "and to secure the goods and chattels so distrained in your hands and so provide, that the same may be liable for further proceeding thereon to be had at the ——— term of the circuit court of said county, when and where you are to make return how you have executed this warrant"].

Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

No. 3. FORTHCOMING BOND.

[See *Bonds*, No. 13.]

No. 4. INDEMNIFYING BOND.

[See *Bonds*, No. 4. If an indemnifying bond is desired under section 6519, use form No. 4, but for "and a doubt arising," etc., insert, "and the said D. D. having made the affidavit required by section 6519 of the Code."]

No. 5. AFFIDAVIT OF POOR DEBTOR UNABLE TO GIVE FORTHCOMING BOND.

(Code, § 6519.)

C. C. }
 v. } On a Distress Warrant:
 D. D. }

County of ———, to-wit:

This day personally appears before me, the undersigned, a justice of the peace in and for the county aforesaid, in the State of Virginia, D. D., who made oath before me in my said county, that he is the tenant in the proceedings aforesaid, whose property has been levied on by virtue thereof, and that he is unable to give the bond required by section 6518 of the Code of Virginia, and that he has a valid defense to said proceedings under section 6522 of the Code of Virginia.

Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

No. 6. WRIT OF VENDITIONI EXPOSAS.

(Code 1887, § 6493.)

The Commonwealth of Virginia,

To X. Y., Sheriff of ——— county—Greeting:

We command you that you expose to sale those goods and chattels of D. D., to the value of ——— dollars, which, according to our command you have taken under a distress warrant issued by J. T., a justice of the peace of said county, on the ——— day of ———, 192—, and which remain in your hands unsold, as is shown by your return upon said writ now filed in the clerk's office of said county, to satisfy P. P., the said sum of ——— dollars, which appears to be due on said warrant of distress, and make return hereof to the ——— court of said county, within thirty days from said sale.

Witness, J. N., clerk of our said court, at the court-house, this ——— day of ———, 192—, and the ——— year of our foundation.

J. N., Clerk.

NO. 7. NOTICE TO TENANT OF APPLICATION TO COURT TO ASCERTAIN VALUE
OF PART OF CROP.
(Code, 1887, § 5528.)

To Mr. D. D.:

Whereas X. Y., constable (or *sheriff* or *deputy for J. R., sheriff*) of _____ county, has distrained certain goods, for rent due me from you, reserved upon contract in a _____ share of the crops and produce of certain premises, in said county, occupied by you as my tenant:

This is, therefore, to notify you that on the _____ day of the next _____ term of the circuit court of said county, I shall move the said court to ascertain the value in money of the said share of the crops and produce reserved as aforesaid, and to order the goods so distrained as aforesaid to be sold in order to obtain the amount so ascertained. This _____ day of _____, 192—.

P. P.

V. ARREST, COMMITMENT, AND BAIL.

(For arrest without a warrant, see *Arrest*. For bail by a court or judge, see *Bail*.)

- § 1. Who may issue process of arrest
- § 2. When it may issue; what to recite and require; to whom directed; where tried
- § 3. When and where warrant may be executed; who exempt from arrest
- § 4. Manner of executing warrant
 - (1) What constitutes an arrest
 - (2) When officer should show warrant
 - (3) Officer may summon assistance
 - (4) When officer may break open doors
 - (5) Penalty on officer for neglect of duty
 - (6) Re-arresting a prisoner who has escaped
 - (7) When officer, in executing warrant, may be justified in killing accused
- § 5. What to be done with accused when arrested
 - (1) Before whom he shall be brought
 - (2) When warrant issues in another county or corporation
 - (3) Accused arrested for misdemeanor, and to be carried to another jurisdiction, may be bailed where arrested
- § 6. Examination or trial before a justice
 - (1) Adjournment of examination or trial
 - (2) Justice may associate other justice with him
 - (3) Examination of witnesses; their separation
 - (4) When accused discharged; when tried; when committed or bailed
- § 7. Various forms under "Arrest, Commitment, and Bail"
- § 8. Miscellaneous forms under "Arrest, Commitment, and Bail"
- § 1. Who may issue process of arrest.—A judge in

vacation or during term, or a justice, may issue a warrant for the arrest of person charged with an offense (Code, § 4823). But a justice cannot act while out of his county or corporation. For a coroner's power to issue a warrant of arrest, see *Coroner's Inquest*.

§ 2. When it may issue; what to recite and require; to whom directed; where tried.—On complaint of a criminal offense to a judge or justice, he examines on oath the complainant and other witnesses, or when he suspects an offense punishable by imprisonment has been committed, he may, without formal complaint, issue a summons for witnesses, and shall examine them, and if he sees good reason to believe an offense has been committed he issues his warrant, reciting the offense, and requiring the person accused to be arrested and brought before a justice of the county or corporation; and in the same warrant he may require the officer to summon witnesses therein named to appear and give evidence. In misdemeanor cases in the county, the warrant is returnable and tried in the magisterial district where the offense was committed, by a justice of the district, unless for good cause shown by affidavit of the defendant the warrant is removed by the justice to another point in another district. (Code, § 4824.) For when a justice may issue a warrant for the arrest of a fugitive from justice, and the proceedings thereon, see *Fugitive from Justice*. The warrant may be directed to the sheriff, sergeant, or constable, by name or official designation, or even to a person not an officer, who is specially designated, but he cannot be compelled to execute it. In cities and towns having a police force, the warrant is directed "to any policeman of said city (or town)", and is executed by the policeman into whose hands it is delivered. (Code, § 4824.)

§ 3. When and where warrant may be executed; who exempt from arrest.—Although not returnable at any particular time, yet the warrant should be executed as soon as possible, in the night time as well as in the day time, and even on Sunday.

A warrant may be executed anywhere in the State. The officer to whom the warrant is lawfully directed may execute the same not only within his county or corporation, or upon

any bay, creek, or river adjoining thereto, but if the accused escape from or be out of the county or corporation where the offense was committed, the officer may pursue and arrest him anywhere in the State; or a justice of another county or corporation, on being satisfied of the genuineness of the warrant may endorse thereon his name, as justice, and such endorsement operates as a direction of the warrant to an officer of his county or corporation. (Code, §§ 2822, 4825.)

Such endorsement may be as follows:

"Being satisfied of the genuineness of the within warrant, I do hereby endorse the same and authorize its execution within this county. This ——— day of ———, 192—.

J. T., J. P. of ——— County."

Members of the legislature, and its clerks and assistants while in attendance, and for one day before and after the session for each twenty miles he must necessarily travel to or from his home, are privileged from arrest, except for treason, felony, or breach of the peace; nor can he be arrested at any time for words spoken or written or proceedings had in the legislature, but that body may punish him therefor. (Code, §§ 299, 300, 302.) Persons in military service are also exempt from arrest except for felony or breach of the peace.

Judges, grand jurors, witnesses, voters, and preachers are exempt from arrest under civil process (Code, § 2823); and so also, at common law, are attorneys and parties to suits.

§ 4. Manner of executing warrant.

(1) *What constitutes an arrest.*—Unless the accused by words or actions, submits to be in custody, to constitute an arrest the officer must, with words of arrest, either touch his person or confine him in a room; bare words will not be sufficient.

(2) *When officer should show warrant.*—A known officer, acting within his county or corporation, need not show his warrant; but an officer not commonly known, or out of his jurisdiction, and for greater reason a private person, should do so upon demand; yet he should not part with it, for it is his authority. In any case, however, the party should be notified of the substance of the warrant; indeed it is a better practice in all cases to show the warrant, if demanded, so as to leave no excuse for resistance.

(3) *Officer may summon assistance.*—In executing a warrant of arrest in an effort to preserve the peace, or any other process, the officer, if resistance be made or feared, may summon a posse, or so many persons of his county or corporation as may be sufficient, or he may require the commandment of any regiment therein to call out a sufficient portion of his regiment to aid him; and such summons or requisition must be obeyed on pain of fine and imprisonment. (Code, §§ 2822, 4511-12.)

(4) *When Officer may break open doors.*—In general, a man's house is his castle and private sanctuary, and is not to be violated except when public necessity demands it. But an officer clothed with the authority of public law may, with impunity—after notification of his business, demand admittance, and in case of refusal,—break outer and inner doors of dwellings, to execute a warrant for felony or breach of the peace; or, as some authorities state for any offense, or for any cause for which an arrest is required to be made. The house of a third person may likewise be broken open, but at the officer's peril of finding the party; for, if not there, he is a trespasser, as he also is if he takes the wrong person or if the justice had no jurisdiction of the case.

(5) *Penalty on officer for neglect of duty.*—If an officer wilfully and corruptly refuses to execute a lawful warrant of arrest, or wilfully and corruptly omit or delay to execute it, so that the party escapes, he is punishable by jail not over 6 months and fine not over \$500. (Code, § 4510.) If he received a bribe for omitting or delaying to execute the warrant, he is punishable by jail not over 6 months, and fine not over \$100. (Code, § 4502.)

(6) *Re-arresting a prisoner who has escaped.*—Whether an officer who voluntarily suffers a prisoner to escape, or relies upon his promise that he will return, can take him again without further warrant of arrest, is a mooted question; but if he returns and puts himself again under the custody of the officer he may then be lawfully detained by virtue of the general warrant. But when the prisoner escapes by his own wrong or through the negligence of the officer, or, it would seem, by virtue of a rescue, the officer may open fresh pursuit and retake him wherever he may be found, even in another county,

and may break open doors for that purpose upon demand and refusal of admittance; and on ground of necessity, is justified in killing a fleeing felon or any resisting offender, if otherwise unable to re-capture him. Also, a justice, upon proper complaint made to him, may issue his warrant to plaintiff and re-take any prisoner who has escaped from lawful custody, and such warrant runs throughout the Commonwealth, and may be executed at any time and any place.

(7) *When officer, in executing warrant, may be justified in killing accused.*—In case of felony or misdemeanor, if the accused resists or flees, so that he cannot be taken alive, the officer is justified in killing him; also, an officer or a private person coming to his aid is justified in killing him.

§ 5. What to be done with accused when arrested.—

(1) *Before whom he shall be brought.*—An officer arresting a person brings him before a justice of the county or corporation in which the warrant was issued, unless such person be let to bail (see (3), below). For where the warrant issues in another county or corporation, see (2), below. In misdemeanor cases, where the warrant issues in the county where the offense is committed, the accused must be brought before a justice in the magisterial district where the offense was committed. (Code, § 4826.)

(2) *When warrant issues in another county or corporation.*—Where a warrant is issued in a county or corporation where the offense was not committed, the justice before whom the accused is brought, unless he be admitted to bail as provided below, by warrant commits him to an officer to be carried to the county or corporation where the offense was committed, and consequently where the trial should be, and delivers him to a justice thereof. (Code, § 4827.)

(3) *Accused arrested for misdemeanor, and to be carried to another jurisdiction, may be bailed where arrested.* (Code, § 4837.) The bail bond, or recognizance, is for his appearance before the court having jurisdiction of the case (Code, § 4973).

The statute embraces three cases of arrest—all in misdemeanor cases: (1) where accused is pursued or arrested in another county or corporation; (2) where he is arrested therein by an officer, by endorsement on back of the warrant; (3)

where he is arrested under warrant issued in a county or corporation where the offense was not committed.

§ 6. Examination or trial before a justice.—

(1) *Adjournment of examination or trial.*—An examination or trial may be adjourned not exceeding ten days at a time without the consent of the accused, and to any place within the county or corporation. If the offense be a felony, unless where only a light suspicion of guilt exists, he is committed to jail; otherwise, he is bailed, or for want of bail, committed to jail. On the day set, he is brought before the justice by his verbal order to an officer, or his warrant to a different person. If the bail bond is forfeited, the fact is certified to court. (Code, §§ 4839-41.)

(2) *Justice may associate other justices with him.*—A justice may associate with him one or two other justices, but in case of disagreement, the opinion of the justice to whom the complaint is made, or before whom the prisoner is brought, prevails, except where there are three, when a majority controls. (Code, § 4848.)

(3) *Examination of witnesses, their separation.*—The witnesses on both sides must be examined on oath in the presence of the accused, who may be assisted by counsel. While one witness is being examined, the others, by order of the justice, must be excluded from the place of examination, and kept separate from each other. If the justice deems proper the testimony may be reduced to writing, and, if required by him, shall be signed by them respectively. (Code, §§ 4842-4.)

The oath or affirmation of the witness may be as follows: "You do solemnly swear (or affirm) that the evidence you shall give in the case now pending before me, between the Commonwealth, plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth: so help you God?"

(4) *When accused discharged; when tried; when committed or bailed.*—If there is not sufficient cause for charging the accused with the offense, he is discharged. In cases of misdemeanor (except liquor cases), he convicts him, if found guilty (see *Trial of Misdemeanors by a Justice*, below). In felony cases, if there is sufficient cause for charging him with an offense, he is committed to jail, or let to bail; and the

witnesses may be recognized, either with or without sureties to appear at court. (Code, § 4845.)

The commitment shall be for trial, and the recognizance for appearance in court. The justice certifies to the court the nature of the offense, and whether the accused was committed or bailed, along with any bail bond taken; and the clerk informs the attorney for the Commonwealth of such certificate. (Code, §§ 4846-7.)

§ 7. Various forms under "Arrest, Commitment, and Bail".—

No. 1. COMMITMENT OF ACCUSED FOR TRIAL BEFORE THE CIRCUIT COURT.

(Code, §§ 4846-7.)

— county, to-wit:

To X. Y., constable of said county, and to the keeper of the jail of said county:

These are, in the name of the Commonwealth of Virginia, to command you, the said constable, forthwith to convey and deliver into the custody of the keeper of the said jail, together with this warrant, the body of C. D., charged before me, J. T., a justice of said county; on the oath of A. B., with a felony (or a *misdemeanor*) by him committed, in this, that he, the said C. D., on the — day of —, 192—, in said county [here insert description of the offense as in the warrant of arrest], the said C. D. having failed and refused, and still failing and refusing, to furnish recognizance according to the law in such case made and provided, in the sum of — dollars, as was required of him by me, justice aforesaid; and you, the keeper of the said jail, are hereby required to receive the said C. D. into your jail and custody, that he may be tried for the said offense before the county court of said county, and him there safely keep until he shall be discharged by due course of law.

Given under my hand and seal, this — day of —, 192—.

J. T., J. P. [L. s.]

No. 2. CERTIFICATE TO CLERK OF COMMITMENT OF ACCUSED.

(*Idem.*)

— county, to-wit:

To the clerk of circuit court of said county:

I, J. T., a justice of said county, do hereby certify that I have this day committed C. D. to the jail of said county, that he may be tried before the circuit court of said county for a felony (or a *misdemeanor*) by him committed, in this, that he, on the — day of —, 192—, in said county [here insert description of the offense as in the warrant of arrest].

Given under my hand, this — day of — 192—.

J. T., J. P.

1114 JUSTICE OF THE PEACE—*Arrest, Commitment, and Bail*

If any witnesses are recognized, either for the accused or the Commonwealth, just before "Given under my hand," &c., in the above form, insert the following certificate:

"And I do further certify that I have this day recognized P. R., R. S., and W. T., whom I adjudged to be material witnesses in the premises, to appear before the said court on the first day of the next grand jury term thereof, to give evidence on a bill of indictment to be preferred against him the said C. D., for the offense aforesaid."

No. 3. RECOGNIZANCE OF ACCUSED FOR HIS APPEARANCE BEFORE COURT.

(Code, §§ 4845-6, 4973.)

—— county, to-wit:

Be it remembered, that on this —— day of ——, 192——, C. D. and O. P. personally appeared before me, J. T., a justice of said county, and severally acknowledged themselves to owe the Commonwealth of Virginia as follows, that is to say, the said C. D. the sum of —— dollars, and the said O. P. the sum of —— dollars, of their respective goods and chattels, lands and tenements, to be levied, and for the use of the Commonwealth rendered:

Yet upon this condition, that if the said C. D. shall personally appear before the circuit court of said county, on the first day of the next grand jury term thereof, then and there to answer the Commonwealth for a bill of indictment, to be preferred to the grand jury in and for said county, against him, the said C. D., for a felony (or *misdemeanor*) by him committed, in this that he [here insert description of the offense as in the warrant of arrest] whereof the said C. D. stands charged; and shall not depart thence without leave of the said court, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.

J. T., J. P.

In case of "an offense punishable with *death* or confinement in the *penitentiary*," or what is the same thing, in case of a *felony*, the accused cannot be let to bail, "*unless* it be a case in which only a *light suspicion* of guilt exists."

In case of a misdemeanor, the accused may be recognized, either with or without surety, in the discretion of the justice.

No. 4. CERTIFICATE TO CLERK OF COURT WHEN ACCUSED IS BAILED.

(Code, §§ 4846-7.)

—— county, to-wit:

To clerk of circuit court of said county:

I, J. T., a justice of said county, do hereby certify that C. D. has this day been let to bail, with sureties for his appearance before

the circuit court of said county, on the first day of the next grand jury term thereof, to answer an indictment in the said court for a felony (or a *misdemeanor*) by him committed, in this, that he, on the _____ day of _____, 192—, in said county [here insert description of the offense as in the warrant of arrest].

Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

If any witnesses are recognized, make the same insertion in the above certificate as is noted under No. 2.

NO. 5. RECOGNIZANCE OF WITNESSES FOR APPEARANCE BEFORE GRAND JURY.

(Code, §§ 4845, 4973.)

_____ county, to-wit:

Be it remembered, that on the _____ day of _____, 192—, P. R., R. S., and W. T. (or as many as the justice may deem material witnesses), of said county, personally appeared before me, J. T., a justice of said county, and each of them acknowledged himself separately and individually to owe the Commonwealth of Virginia the sum of _____ dollars, of their respective goods and chattels, lands and tenements, to be levied, and for the use of the Commonwealth rendered.

Yet upon this condition, that if the said P. R., R. S., or W. T. shall personally appear before the circuit court of said county, on the first day of the next grand jury term thereof, then and there to give evidence on a bill of indictment to be preferred to the grand jury in and for said county, against him, the said C. D., for a felony (or *misdemeanor*) by him committed, in this, that he [here insert description of offense as in warrant of arrest]; and not thence depart without leave of said court, then this recognizance shall be void as to the persons so appearing and complying herewith, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.

J. T., J. P.

Witnesses may be recognized either without sureties as above, or with them, in the discretion of the justice; if surety is required, a recognizance for each witness, with his surety, can easily be framed by following No. 3 to the condition, and then say: "Yet upon this condition, that if the said P. R. shall personally appear," &c. [concluding as in above form].

The *certificate* of recognizance of witnesses we have, for convenience, embodied in No. 2, if the accused be *committed*; but in No. 4, if he be *bailed*.

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No. 6. COMMITMENT OF ACCUSED FOR FUTURE APPEARANCE BEFORE THE JUSTICE.

(Code, §§ 4839, 4841.)

—— county, to-wit:

To the keeper of the jail of said county:

Receive into your jail and custody C. D., herewith sent you by X. Y., a constable of said county, he, the said C. C., having been brought before me, J. T., a justice of said county, charged on the oath of A. B. with a felony (or *misdemeanor*) by him committed, in this, that he, on the —— day of ——, 192—, in said county [here insert description of offense as in warrant of arrest]; the examination touching the said offense being adjourned for further examination until the —— day of ——, 192—, at ——, in said county, and the said C. D. having failed and refused to furnish recognizance according to law in such case made and provided, in the sum of —— dollars, as was required of him by me, justice aforesaid; and him, the said C. D., you safely keep in your jail and custody until the said —— day of ——, 192—, when you are hereby required to surrender and deliver him up to the said X. Y., constable aforesaid, upon his demand, or to any other person who shall present to you a written order under my hand, demanding his surrender and delivery to such person.

Given under my hand and seal, this —— day of ——, 192—.

J. T., J. P. [L. s.]

No. 7. RECOGNIZANCE OF ACCUSED FOR FURTHER APPEARANCE BEFORE THE JUSTICE.

(*Idem.*)

—— county, to-wit:

Be it remembered, that on the —— day of ——, 192—, C. D. and O. P. personally appeared before me, J. T., a justice of the said county, and severally acknowledged themselves to owe the Commonwealth of Virginia as follows: that is to say, the said C. D. the sum of —— dollars, and the said O. P. the sum of —— dollars, of their respective goods and chattels, lands and tenements, to be levied, and for the use of the Commonwealth rendered: Yet upon this condition, that if the said C. D. shall personally appear at ——, in said county, on the —— day of ——, 191—, at —— a. m. (or p. m.), then and there to answer before J. T., justice aforesaid, or some other justice of said county, the charge of a felony (or *misdemeanor*) by him committed, in this, that the said C. D., on the —— day of ——, 192—, in said county, [here insert description of offense as in warrant of arrest], upon which charge the said C. D. has been duly arrested and is now in custody before the said J. T., justice aforesaid, upon examination for the said offense, the further examination thereof, for good cause, being continued until the said —— day of ——, 192—; then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.

J. T., J. P.

Accused cannot be let to bail in case of *felony*, except where only a *slight suspicion* of guilt exists.

No. 8. FORFEITURE OF RECOGNIZANCE, WHERE ACCUSED FAILS TO APPEAR BEFORE A JUSTICE.

(Code, § 4840.)

— county, to-wit:

At —, in said county, — day of, 192—, at — a. m. (or *p. m.*):

The within named C. D., who stands bound by the within recognizance, acknowledged before me, J. T., a justice of said county, with O. P. his surety, to appear here this day, to answer the charge set forth in the within recognizance, was by my order this day solemnly called to answer the said charge, but came not; all of which is hereby certified.

J. T., J. P.

Endorse the above on the back of the recognizance, if the accused does not appear upon being called.

No. 9. COMMITMENT OF ACCUSED, WHEN SURRENDERED BY HIS BAIL TO A JUSTICE.

(Code, §§ 4982-3.)

— county, to-wit:

To X. Y., constable of said county, and to the keeper of the jail of said county:

Forasmuch as O. P. stands bound by recognizance as the surety and bail of C. D. for his appearance before the circuit court of said county, on the first day of the next grand jury term thereof, to answer the Commonwealth for a felony (or *misdemeanor*), in this that he [here insert description of offense as in warrant of arrest], and the said O. P. has this day taken the body of the said C. D. and surrendered him before me, J. T., a justice of said county, in discharge of his said recognizance, and the said C. D. has failed to furnish further recognizance according to the law in such case made and provided, in the sum of — dollars, as was required of him by me, justice aforesaid:

These are, therefore, in the name of the Commonwealth of Virginia, to command you, the said constable, forthwith to convey and deliver, together with this warrant, the body of the said C. D. into the custody of the keeper of the said jail: and you the keeper of the said jail, are hereby required to receive the said C. D. into your

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custody in said jail, and him there safely keep until he shall be discharged by due course of law.

Given under my hand and seal, this _____ day of _____, 192—.
J. T., J. P. [I. S.]

No. 10. CERTIFICATE TO BAIL, WHERE ACCUSED IS SURRENDERED TO A JUSTICE.

(Code, § 4983.)

_____ county, to-wit:

This is to certify to whom it may concern, that O. P. was bound by recognizance as the surety and bail of C. D. for his appearance before the county court of said county, on the first day of the next grand jury term thereof, to answer the Commonwealth for a felony (or *misdemeanor*), in this, that he [here insert description of offense as in the warrant of arrest], and that the said O. P. has this day surrendered him, the said C. D., before me, J. T., a justice of said county, in discharge of the recognizance of the said O. P., according to the law in such case made and provided.

Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 11. NEW RECOGNIZANCE OF ACCUSED, WHEN SURRENDERED BEFORE A JUSTICE.

(Code, § 4983.)

[Follow No. 3 to the condition, and conclude thus]:

Yet upon this condition, that whereas B. C. stood bound by recognizance as the surety and bail of the said C. D. for his appearance before the county court of said county, on the first day of the next grand jury term thereof, to answer the Commonwealth for a felony (or *misdemeanor*) by him committed, in this, that he [here insert description of the offense as in the warrant of arrest], and the said B. C. has this day taken the body of the said C. D. and surrendered him before me, J. T., a justice of said county, in discharge of his said recognizance; and whereas the said O. P. has undertaken before me, justice as aforesaid, as surety of the said C. D. for his appearance before the court aforesaid, on the first day of the next grand jury term thereof, to answer the Commonwealth for the said offense, and that he, the said C. D., will not then depart from the said court without leave thereof: Now, if the said C. D. shall personally appear before the county court of said county, on the first day of the next grand jury term thereof, to answer the Commonwealth for the said offense whereof he stands charged, and shall not depart thence without leave of the said court, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.

J. T., J. P.

No. 12. ENDORSEMENT AUTHORIZING EXECUTION OF WARRANT ISSUED
IN ANOTHER COUNTY.

(Code, § 4825.)

—— county, to-wit:

Being satisfied of the genuineness of the within warrant, I do hereby endorse the same and authorize its execution within this county. This —— day of ——, 192—.

J. T., J. P. of said county.

No. 13. WARRANT TRANSFERRING ACCUSED TO COUNTY WHERE CRIME
WAS COMMITTED.

(Code, § 4827.)

—— county, to-wit:

To X. Y., sheriff of said county:

Whereas C. D. has been arrested and brought before me, a justice of said county, charged with a felony (or *misdemeanor*), in this, that he, on the —— day of ——, 192—, in the county of —— [here insert description of offense as in the warrant of arrest]; now that the said C. D. may be conveyed to said county of ——, where the said offense was committed:

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to convey the said C. D. to said county of ——, and there carry him before some justice of said county, to be dealt with according to law.

Given under my hand and seal, this —— day of ——, 192—.

J. T., J. P. [L. s.]

If the offense be a *misdemeanor*, the prisoner may demand to be brought before a justice of the county wherein he is arrested, that he may give *bail*. (See next form for such recognizance.)

No. 14. RECOGNIZANCE OF ACCUSED TO APPEAR BEFORE CIRCUIT COURT
OF ANOTHER COUNTY.

(Code, § 4837.)

[Follow No. 2 to the condition, and conclude thus:]

Yet upon this condition, that whereas the said C. D., has been this day arrested and brought before me, J. T., a justice of said county, by virtue of a warrant issued by J. M., a justice of the county of ——, charged with a misdemeanor, in this, that he, on the —— day of ——, 192— [here insert description of the offense as in the warrant of arrest]: Now if the said C. D. shall personally appear before the circuit court of —— county (the county where the offense was committed), on the first day of the next grand jury term thereof, then and there to answer the Commonwealth touching the said offense, and shall not depart thence without leave of the said court, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.

J. T., J. P.

In case of *felony*, accused cannot, in any instance, whether light suspicion of guilt exists or not, be *recognized* from one county to another.

§ 8. Miscellaneous forms under "Arrest, Commitment, and Bail."—

No. 1. WARRANT TO DETAIN A PRISONER, ALREADY IN JAIL, FOR ANOTHER OFFENSE.

— county, to-wit:

To the keeper of the jail of said county:

You are hereby commanded to detain in your custody, in said jail, the body of C. D. now in your custody there, he being further charged before me, J. T., a justice of said county, upon the oath of A. B., with a felony (or *misdemeanor*) by him committed, in this, that he, on the — day of —, 192—, in said county [here insert description of offense as in the warrant of arrest]; him, therefore, safely keep in your jail and custody for this cause, until he shall be thence discharged by due course of law.

Given under my hand and seal, this — day of — 192—.

J. T., J. P. [L. S.]

No. 2. RECOGNIZANCE OF BAIL, TAKEN, BY A SHERIFF, UNDER CAPIAS TO ANSWER AN INDICTMENT OR PRESENTMENT FOR A MISDEMEANOR

(Code, § 4887.)

— county, to-wit:

Be it remembered, that on the — day of —, 192—, C. D. and O. P. personally appeared before me, J. T., the sheriff of said county, and severally acknowledged themselves to owe the Commonwealth of Virginia, as follows, that is to say, the said C. D. the sum of — dollars, and the said O. P. the sum of — dollars, of their respective goods and chattels, lands and tenements, to be levied, and for the use of the Commonwealth rendered:

Yet upon this condition, that whereas the said C. D. has been arrested by me, the said sheriff, by virtue of a *capias* issued from the circuit court of — county, directed to, and commanding me, as such sheriff, to take the body of the said C. D., and him safely keep, so as to have his body before the judge of the said court, at the court-house thereof, on the first day of the — term, 192—, of the circuit court of said county, to answer a certain indictment therein found against him (or *presentment therein made against him*, or *information therein filed against him*), and now pending in said court for [here state the offense as set forth in the *capias*]: Now, if

the said C. D. shall personally appear before the judge of the circuit court of _____ county, at the court-house thereof, on the first day of the next _____ term of the said court, to answer for the said offense, and shall not depart thence without leave of the said court, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in the county of _____, the day and year first above written.

J. T., Sheriff.

NO. 3. SHERIFF'S CERTIFICATE TO ACCUSED WHEN BAIL IS GIVEN.

(Code, § 4882.)

_____ county, to-wit:

This is to certify to whom it may concern, that I, J. T., the sheriff of said county, this day have let C. D. to bail, he, the said C. D. having been this day arrested by me under a *capias* to answer an indictment (or *presentment* or *information*) before the circuit court of _____ county, on the first day of the next _____ term thereof, for [here describe the offense as in the *capias*]. Given under my hand, this _____ day of _____, 192—.

J. T., Sheriff.

NO. 4. WARRANT OF ARREST FOR AN OFFENSE AGAINST THE UNITED STATES.

United States of America,

Eastern (or *Western*) District of Virginia,

_____ county, to-wit:

To X. Y., or any other constable of said county:

Whereas A. B. has this day made information and complaint, on oath, before me, J. T., one of the justices of the State of Virginia, in and for said county, that C. D., on the _____ day of _____, 192—, in the county and district aforesaid [here describe the offense as in the act of Congress defining and prohibiting it]:

These are, therefore, in the name of the United States of America, to command you forthwith to apprehend and bring before me, or some justice in and for the said county, the body of the said C. D., to answer the said charge and further to be dealt with according to the laws of the United States.

Given under my hand and seal, this _____ day of _____, 192—.

J. T., J. P. [L. S.]

In regard to the arrest of persons charged with crimes against the United States, "the offender may, by any justice or judge of the United States, or by any *justice of the peace* or *other magistrate* of any of the United States, where he may be found, agreeably to the usual mode of process in *such state*, and at the expense of the United States, be arrested and *imprisoned* or *bailed*, as the case may be, for trial before such court of the United States, as by this act has

cognizance of the offense. And copies of the process shall be returned as speedily as may be, into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case, which recognizances the magistrate before whom the examination shall be, may require, on pain of imprisonment." (Acts of 1786; 1 U. S. Laws, p. 72; 1 Story's L. U. S. 66.)

It has been held in Virginia that Congress cannot give jurisdiction to or require the services of any officer of the State government as such, but may *authorize* any citizen of the United States to perform any act which the Constitution of the United States does not require to be performed in a different manner. (Pool & als.' Case, 2 Va. Cas. 276.)

It is not, therefore, the *ex officio duty* of a justice of the peace to do any act required by Congress, but he may exercise the authority thus conferred or not, at his discretion.

No. 5. RECOGNIZANCE FOR APPEARANCE OF ACCUSED BEFORE UNITED STATES COURT.

United States of America,

Eastern (or *Western*) District of Virginia,

— county, to-wit:

Be it remembered, that on this — day of —, 192—, C. D. and O. P. personally appeared before me, J. T., one of the justices of the state of Virginia, in and for said county, and severally acknowledged themselves to owe the United States of America as follows: the said C. D. the sum of — dollars and the said O. P. the sum of — dollars, of their respective goods and chattels, lands and tenements, to be levied, and for the use of the United States rendered:

Yet upon this condition, that if the said C. D. shall personally appear before the United States district court for the western district of Virginia, at —, Va., on the — day of the next — term thereof, then and there to answer the government of the United States for a bill of indictment then and there to be preferred against him, the said C. D., for felony (or *misdemeanor*) by him committed, in this, that he [here describe the offense as in the warrant of arrest], whereof the said C. D. stands charged, and shall not depart hence without leave of the said court, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in the county and district aforesaid, the day and year first above written.

J. T., J. P.

See note under preceding form.

No. 6. COMMITMENT OF ACCUSED FOR TRIAL BEFORE UNITED STATES COURT.

United States of America,

Eastern (or Western) District of Virginia,

— county, to-wit:

To X. Y., constable of said county, and to the keeper of the jail of said county:

Whereas C. D. has been brought before me, J. T., one of the justice of the State of Virginia, in and for said county, charged upon the oath of A. B. with a felony (or *misdemeanor*) by him committed, in this, [here describe the offense as in the warrant of arrest]; and has failed and refused, and still doth fail and refuse, to recognize, according to the laws of the United States in such case made and provided, for his appearance before the United States district court for the Eastern (or Western) district of Virginia, at —, Va., on the — day of the next — term thereof, to answer before the said court for the said offense:

These are, therefore, in the name of the United States of America, to command you, the said constable, forthwith to convey and deliver into the custody of the keeper of the said jail, together with this warrant, the body of the said C. D.; and you, the keeper of the said jail, are hereby required to receive the said C. D. into your jail and custody, and him there safely keep until he shall be thence discharged according to the laws of the United States.

Given under my hand and seal, this — day of —, 192—.

J. T., J. P. [L. s.]

See note under form No. 4.

VI. TRIAL OF MISDEMEANORS BY A JUSTICE

- § 1. What criminal offenses police justices and justices of the peace may try
- § 2. Arrest of accused
- § 3. When to use warrant of arrest; when civil warrant or summons
- § 4. Where warrant returnable
- § 5. Limitation of prosecutions
- § 6. Appeal
- § 7. When judgment for costs given against prosecutor
- § 8. When formal warrants dispensed with
- § 9. Justice may associate other justices with him
- § 10. Compromise of certain misdemeanors
- § 11. When committed to Prison Association, County, or City farm, or chain gang
- § 12. When minors committed to certain other institutions
- § 13. Corporal punishment of minors under 16
- § 14. Various forms under "Trial of Misdemeanors before a Justice"

§ 1. What criminal offenses police justices and justices of the peace may try.—By section 4987 of the Code, it is provided: "The several police justices and justices of the peace, in addition to the jurisdiction exercised by them as conservators of the peace, shall, except for offenses arising under chapter 184 [as to intoxicating liquors], have concurrent jurisdiction with the circuit courts of the counties and the corporation courts of the cities of the State, in all misdemeanor cases occurring within their jurisdiction; in all which cases the punishment shall be the same as the said courts are authorized to impose: Provided, that in any city in which there is a police justice, or in any county in which there is a trial justice appointed under section 4988, the powers and jurisdiction conferred by this section shall not be exercised by any other justice of such city or county, except when acting for and in the stead of the police justice or trial justice according to law. Each justice of the peace, in counties in which there is no trial justice, and each police justice or trial justice may try, or procure some other justice to try, every case of the kind mentioned in this section which is brought before him, and the same may be tried upon a warrant; or he, in his discretion, may make an examination into the offense and proceed according to the provisions of chapter 192"—i. e., commit or bail for trial in court.

For when trial justice for county may be appointed, see Code, § 4988; Acts 1920, p. 314.

Section 4987, above, gives a justice, concurrently with the court, jurisdiction to try all misdemeanor cases, common law and statutory, except cases arising under the chapter (184) as to intoxicating liquors.

The principal common law misdemeanors are as follows: (1) Assault and battery; (2) affray; (3) riot, rout, and unlawful assembly; (4) forcible entry or detainer; (5) public nuisance; (6) libel; (7) conspiracy; (8) forestalling, regrating, and engrossing; (9) maintenance and champerty. (See the several headings in this book.)

The statutory misdemeanors are embraced in chapters 177 to 187 (sections 4389 to 4757 of the Code, being such offenses as are not felonies,—i. e., not punishable with death or confinement in the penitentiary. For distinction between

a misdemeanor and a fine, see section 3, under "Recovery of fines before a Justice, div. VII., below."

A justice, therefore, may try any misdemeanor (except a liquor case), and where a case is brought before him, the justice should try the case or procure some other justice to try it, and should not send it on to the grand jury. Even on a felony warrant, "if he consider that there is sufficient cause to charge the accused with a misdemeanor only," he should try him for the misdemeanor (Code, § 4845). But as a felony is an offense which may be punished by penitentiary or death (Benton's case, 89 Va. 570), so if an offense may, in discretion (as in case of unlawful maiming, etc.), be punished either as a felony or misdemeanor, the justice has no jurisdiction.

The authority of a justice to convict an offender in a summary way, without a trial by jury, is a stranger to the common law, and therefore nothing is presumed in favor of such jurisdiction, and the statute conferring the power must be strictly pursued, otherwise the common law will break in upon him and level all his proceedings; and notwithstanding the trial by jury is dispensed with, yet his proceedings, in other respects, must be regular, according to the course of the common law, regarding himself as both judge and jury.

So that, if a *bona fide* claim to a freehold estate in lands or to a franchise arises and must be decided in the case, the justice is ousted of his jurisdiction and cannot proceed, for such questions are properly triable by a jury. If a justice assumes cognizance, in this or any respect, contrary to law, the remedy is by writ of prohibition.

So, also, on the above principle, it has been held that a commitment for a time certain, unless fine and costs be sooner paid, is void, in the face of a statute (§ 2549) providing that the commitment shall be "until the fine and costs are paid." (Marx's case, 86 Va. 48.)

Upon trial of the accused, the justice, in passing judgment as to his guilt or innocence, should uniformly acquit and discharge him, unless from the evidence adduced before him he is satisfied of his guilt beyond a reasonable doubt. The accused must be convicted on legal evidence, and in due form, and a minute of the whole in writing should be made, so as to

show, if the cause be removed by writ of *certiorari* into the circuit court, that the proceedings have been proper—i. e., that the strict letter of the statute has been observed, and that the proceedings, in other respects, have been regular according to the rules of natural justice of the common law.

§ 2. Arrest of accused.—For the various particulars as to issue of warrant of arrest, when and where executed, who exempt from arrest, manner of executing it, what to be done with accused when arrested in another county or corporation, adjournment of trial, association of other justices with him, examination of witnesses and their separation, etc., see *Arrest, Commitment, and Bail*, div. V., above.

§ 3. When to use warrant of arrest; when civil warrant or summons.—A warrant of arrest may issue for any offense coming within the jurisdiction of a justice, for the rule at common law is, that where a statute gives a justice jurisdiction over an offense it impliedly gives him power to apprehend any person charged with such offense. But as a warrant deprives a person of his liberty, it would be a better and more humane practice to limit its use (unless otherwise directed by statute) to cases: (1) where corporal punishment may be inflicted, for, in those cases, his presence is absolutely necessary, as no judgment can be pronounced in his absence; or (2) where, in proceedings for a mere pecuniary penalty, the offender is likely to abscond, or for some other reason, the arrest of the party would better subserve the purposes of justice.

A civil warrant or summons is the proper process in all cases where the punishment is a mere fine, except where the offender is likely to flee from justice, or where, for other cause, his arrest is particularly desired. If the defendant, after having been duly summoned, and thus given an opportunity of being heard before being condemned, fails to appear, the justice must proceed with the case in his absence. But he should examine the facts of the case as if he were present, for the case must be duly made out, and no judgment rendered by default. In prosecutions by summons for fines, the complaint need not be on oath; and, if the information be sufficient, the justice is bound to issue a summons, which should be signed by him and directed to a constable or sergeant, or

even to the party himself, and a copy thereof served on the defendant. It should contain the substance of the charge, and fix a day and place certain for the defendant or himself and witnesses; otherwise, he commits no default for not appearing, and the justice cannot proceed in his absence upon a summons defective in these particulars.

In the case of a mere fine or forfeiture not exceeding \$20, the proceeding is as for a small claim—see “Recovery of Fines before a Justice,” div. VII., below. For particulars as to arrest, see *Arrest, Commitment and Bail*, div. V., above.

§ 4. Where warrant returnable.—The warrant, in misdemeanor cases, is to be “made returnable and tried in the magisterial district in which the offense was committed by a justice of said district, unless for good cause, shown by affidavit of the defendant, the justice before whom the said warrant is made returnable shall, in his discretion, remove the trial to some point in another magisterial district of the said county” (Code, § 4824).

§ 5. Limitation of prosecutions.—By section 4768 of the Code, “a prosecution for a misdemeanor, or any pecuniary fine, forfeiture, penalty, or amercement, shall be commenced within one year next after there was cause therefor; except that a prosecution for petty larceny may be commenced within five years.”

§ 6. Appeal.—The accused may within ten days appeal to court; and, unless he gives bail, he is committed to jail. The justice should forthwith return the papers to the clerk. The court may amend the warrant, or even issue a new warrant. (Code, § 4989.) The accused is entitled to trial by a jury, in court (Code, § 4990).

§ 7. When judgment for costs given against prosecutor.—In case of acquittal, if the justice believes the charge was made “maliciously and without probable cause, he may render judgment for the costs against the prosecutor” (Code, § 4991); and by section 4868 judgment may be in favor of the defendant for his costs.

§ 8. When formal warrants dispensed with.—In cases of arrests by police officers of cities and towns, while in the discharge of their duties, the justice may try the cases without warrants, unless the accused demand a warrant (Code, § 4992).

§ 9. Justice may associate other justices with him.—A justice may associate with him, in the trial of a case, one or two other justices, but in case of disagreement the opinion of the justice to whom the complaint is made, or before whom the prisoner is brought, prevails, except where there are three when a majority controls (Code, § 4848).

§ 10. Compromise of certain misdemeanors.—"When a person is in jail or under recognizance to answer a charge of an assault and battery, or other misdemeanor for which there is a remedy by civil action, unless the offense was by or between a sheriff or other officer of justice, or riotously, or with intent to commit a felony, if the party injured appear before the judge or justice who made the commitment or took recognizance, and acknowledge in writing that he has received satisfaction for the injury, such judge or justice in his discretion may by an order under his hand, supersede the commitment or discharge the recognizance as to the accused and witnesses." (Code, §§ 4849-50.) But compromises in other cases, or agreeing for pay to conceal or not prosecute such other offenses, is punishable, if the offense be a felony, by jail not over one year and fine not over \$500; and if the offense be a misdemeanor, by jail not over six months and fine not over \$100 (Code, § 4513).

§ 11. When committed to Prison Association, county or city farm, or chain gang.—In case of a minor under 18, arrested or convicted for any offense, the justice or judge may, in his discretion, and with the consent of the Prison Association of Virginia and with the consent of his parent or guardian, if any, if he be committed before conviction, direct that he be committed to the custody and control of the said association, for an indefinite period, not longer than when he arrives at 21 years of age, and the justice must state in his commitment that he is satisfied from the evidence that the minor is not 18 years of age (Code, §§ 1954-5). In the case of negro minors, the commitment is to the Negro Reformatory Association of Virginia (Code, § 1961). Any person convicted of a misdemeanor may be sentenced to the county or city farm (see Acts 1918, p. 332, and Acts 1922, p.—), or to the chain gang see (*Chain Gang*).

§ 12. When minors committed to certain other institutions.—See *Minors, etc.*, section 30.

§ 13. Corporal punishment of minors under 16.—When a minor under 16 is convicted of a misdemeanor, the justice or judge may in lieu of the punishment provided by law, permit the parent or guardian or some other person selected by him, to administer such corporal punishment as shall seem adequate; and the justice or judge designates some suitable person to see such punishment administered. (Code, § 1924.)

§ 14. Various forms under "Trial of Misdemeanors before a Justice."—

No. 1. SUMMONS OR WARRANT OF ARREST TO ANSWER FOR A MERE FINE, BEFORE A JUSTICE.

(Code, §§ 6015, 2543; Acts 1920, p. 319.)

—— county, to-wit:

To X. Y., constable of said county:

Whereas A. B. has this day made complaint and information (*on oath*, in case of arrest) before me, J. T., a justice for said county, that C. D., on the —— day of ——, 192—, in said county [here insert description of the offense]:

These are, therefore, in the name of the Commonwealth of Virginia, to command you to summon the said C. D. to appear at ——, in said county, on the —— day of ——, 192—, at —— a. m., before me or such other justice of said county as may then be there to hear the case [or if the *arrest* of the party be desired, instead of "to summon," &c., say, "*forthwith to apprehend and bring before me, or some other justice of said county, the body of the said C. D.*"], to answer the said complaint, and further to be dealt with according to law. And you are hereby required to summon A. B., B. C., and D. E. to appear and give evidence in behalf of the Commonwealth on the examination touching the said offense.

Given under my hand and seal, this —— day of ——, 192—. J. T., J. P. [L. s.]

It should be observed that, in a prosecution for a misdemeanor punishable by a mere fine, a justice may issue a *warrant of arrest* or a *mere summons*, as will best meet the purposes of justice. If a warrant of arrest is desired, use the part within brackets, or No. 1, under "Arrest, Commitment, and Bail," div. II., above.

No. 2. JUDGMENT OF "NOT GUILTY."

(Code, §§ 4845, 4987.)

—— county, to-wit:

The defendant C. D. is found not guilty as charged in the within

warrant (or *indictment*), and is discharged, this _____ day of _____, 192—. J. T., J. P.

No. 3. JUDGMENT OF "GUILTY," AND IMPOSING A FINE.

(*Idem.*)

_____ county, to-wit:

The defendant C. D., upon the evidence on oath of A. B., B. C., and D. E., is found guilty of [here state what] as charged in the within warrant, and is adjudged to pay a fine of _____ dollars (*one-half to A. B., the informer, and the other half to the Commonwealth, if the statute so declares*), and \$_____ costs. This day of _____, 192—. J. T., J. P.

Security may now be taken, for the payment of a fine and costs or costs alone within 30 days (Code, § 2549). The following endorsement on the warrant (or *indictment*) will be sufficient to bind surety: "S. S. is surety for the payment of \$_____ fine, and \$_____ costs (or of \$_____ costs), the amount of the judgment upon the within warrant (or *indictment*). This _____ day of _____, 192—.

J. T., J. P.

If the justice, in lieu of surety or commitment to jail, desires to issue an execution, as it seems he may, use form of "Execution in Debt or Damages," under *Warrants for Small Claims*, No. 28, and instead of "P. P.," say "the Commonwealth;" and in lieu of "warrant in debt (or *damages*)," say "warrant (or *indictment*) for a misdemeanor."

No. 4. COMMITMENT UNTIL FINE AND COSTS ARE PAID.

(Code, § 2549.)

_____ county, to-wit:

To X. Y., constable of said county, and to the keeper of the jail of said county:

Whereas C. D. was this day found guilty before me, J. T., a justice of said county, of [here state what offense], and I, the said J. T., therefor adjudged that he should pay a fine of _____ dollars, for his said offense, and _____ dollars, the cost of the prosecution; and the said C. D., being so convicted, and being now required by me to pay the said fine and costs, has not paid the same, but wholly failed to do so:

These are, therefore, in the name of the Commonwealth of Virginia, to command you, the said constable, to take the said C. D. and convey him to the jail of said county, and there to deliver him to the keeper thereof, together with this warrant; and I command you, the keeper of the said jail, to receive the said C. D. into your custody in the said jail, and him there safely keep until he shall have paid the said fine and costs, or until he be otherwise discharged by law.

Given under my hand and seal, this _____ day of _____, 192—.
J. T., J. P. [L. s.]

The Justice *may* commit the accused upon default of payment of fine and costs, or of either. See, also, note to No. 3.

No. 5. JUDGMENT OF "GUILTY," AND IMPOSING FINE AND IMPRISONMENT.
(Code, § 4987.)

____ county, to-wit:

The defendant, C. D., upon the evidence on oath of A. B., B. C., and D. E., is found guilty of [here state what] as charged in the within warrant (or *indictment*), and I do adjudge that he pay a fine of _____ dollars and _____ dollars costs; and that he be confined in the jail of _____ county for the term of _____ months. This _____ day of _____, 192—. J. T., J. P.

No. 6. COMMITMENT FOR IMPRISONMENT.

(*Idem.*)

____ county, to-wit:

To X. Y., constable of said county, and to keeper of the jail of said county:

Whereas C. D. was this day found guilty before me, J. T., a justice of said county, of [here state what offense], and I, the said J. T., therefor adjudged that he should be confined in the jail of _____ county for the term of _____ months (*and that he pay a fine of _____ dollars, and _____ dollars costs, if that be the case*):

These are, therefore, in the name of the Commonwealth of Virginia, to command you, the said constable, to take the said C. D. and convey him to the jail of said county and there to deliver him to the keeper thereof, together with this warrant; and I command you, the keeper of the said jail, to receive the said C. D. into your custody in the said jail, and him there safely keep for the term of _____ months (*and thereafter until the said fine and costs shall have been paid, or until he be otherwise discharged by law, if a fine be also imposed*).

Given under my hand and seal, this _____ day of _____, 192—. J. T., J. P. [L. s.]

No. 7. JUDGMENT AND AN APPEAL THEREFROM.

(Code, §§ 4989, 6027.)

____ county, to-wit:

Be it remembered, that on the _____ day of _____, 192—, C. D. was brought before me, J. T., a justice of said county, charged with a misdemeanor, in this, that he [here insert description of the offense], and is by me, upon the evidence on oath of A. B., B. C., and D. E., found guilty of said offense; wherefore I adjudge that he [here insert

the penalty inflicted, whether fine or imprisonment, or both]. But the said C. D. having prayed an appeal from my said judgment, an appeal is hereby granted him to the next term of the circuit court of ——— county, and the said judgment and conviction, as well as the said appeal, are hereby certified to the said court.

Given under my hand and seal, this ——— day of ———, 192—.

J. T., J. P. [L. s.]

If the case be one wherein there is no *appeal of right*, but an appeal only *as in civil cases*, as where the punishment is merely a fine and *exceeds* \$10, use the above form, but immediately after the phrase "my said judgment" insert this: "and tendered J. R. as his surety, who thereupon undertook, as his surety, for the payment of the said judgment, and all costs and damages, in case the same is affirmed."

No. 8. COMMITMENT, WHERE ACCUSED APPEALS TO COURT.

(Code, § 4989.)

——— county, to-wit:

To X. Y., constable of said county, and to the keeper of the jail of said county:

Whereas C. D. was this day brought before me, J. T., a justice of said county, charged with a misdemeanor, in this, that he, on the ——— day of ———, 192—, in said county [here insert description of the offense as in the warrant of arrest], and was by me found guilty of the said offense, and adjudged to [here insert the penalty inflicted, whether fine or imprisonment, or both]; and whereas the said C. D. has taken an appeal from my said judgment to the next term of the circuit court for said county, and has failed to give bail, to recognize with him, in the sum of ——— dollars each, for his appearance before the said court, then and there to answer for the said offense:

These are, therefore, in the name of the Commonwealth of Virginia, to command you, the said constable, forthwith to convey and deliver into the custody of the keeper of the said jail, together with this warrant, the body of the said D. D.; and you, the keeper of the said jail, are hereby required to receive the said C. D. into your custody in the said jail, and him there safely keep until he shall be thence delivered by due course of law.

Given under my hand and seal, this ——— day of ———, 192—.

J. T., J. P. [L. s.]

No. 9. RECOGNIZANCE OF ACCUSED WHERE HE APPEALS TO COURT

(*Idem.*)

——— county, to-wit:

Be it remembered, that on this ——— day of ———, 192—, C. D. and O. P. personally appeared before me, J. T., a justice of said county,

and severally acknowledged themselves to owe the Commonwealth of Virginia, as follows, that is to say, the said C. D. the sum of ——— dollars and the said O. P. the sum of ——— dollars, of their respective goods and chattels, lands and tenements, to be levied, and for the use of the Commonwealth rendered:

Yet upon this condition, that whereas the said C. D. was this day tried before me, J. T., a justice of said county, for a misdemeanor, in this, that he [here insert description of the offense as in the warrant of arrest], and by me adjudged to [here insert the penalty inflicted, whether fine or imprisonment, or both]; from which said judgment and conviction the said C. D. took an appeal to the next term of the circuit court of said county. Now if the said C. D. shall personally appear before the said circuit court, on the first day of the next ——— term thereof, to answer the Commonwealth for and concerning the said offense, whereof he has been found guilty and convicted by me, and shall not thence depart without leave of the said court, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.
J. T., J. P.

No. 10. RECOGNIZANCE OF WITNESSES WHERE ACCUSED APPEALS TO COURT.

(*Idem.*)

——— county, to-wit:

Be it remembered, that on the ——— day of ———, 192—, A. B., B. C., and D. E. personally appeared before me, J. T., a justice of said county, and each of them acknowledged himself separately and individually to owe the Commonwealth of Virginia the sum of ——— dollars, of their respective goods and chattels, lands and tenements, to be levied, and for the use of the Commonwealth rendered:

Yet upon this condition, that if the said A. B., B. C., and D. E. shall personally appear before the circuit court of said county, on the first day of the next ——— term thereof, then and there to give evidence on behalf of the Commonwealth (or of C. D.), in a case appealed to the said court by C. D., this day convicted before me of [here state what offense], and shall not thence depart without leave of the said court, then this recognizance shall be void as to the person so appearing and complying herewith, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.
J. T., J. P.

No. 11. COMMITMENT WHERE ACCUSED IS SURRENDERED BY HIS BAIL TO A JUSTICE.

(Code, §§ 4982-3.)

—— county, to-wit:

To X. Y., constable of said county, and to the keeper of the jail of said county:

Forasmuch as O. P. stands bound by his recognizance as the surety and bail of C. D. for his appearance before the circuit court of said county, on the first day of the next —— term thereof, to answer the Commonwealth for a misdemeanor, in this, that he [here insert description of the offense as in warrant of arrest]; of which offense the said C. D. was found guilty by me, and from my said judgment he appealed to the said circuit court; and he the said O. P. has this day taken the body of the said C. D. and surrendered him before me, J. T., a justice of said county, in discharge of his said recognizance, and the said C. D. has failed to furnish further recognizance according to the law in such case made and provided, in the sum of —— dollars, as was required of him by me, justice aforesaid:

These are, therefore, in the name of the Commonwealth of Virginia, to command you, the said constable, forthwith to convey and deliver, together with this warrant, the body of the said C. D. into the custody of the keeper of the said jail; and you, the keeper of the said jail, are hereby required to receive the said C. D. into your custody in the said jail, and him there safely keep until he shall be discharged by due course of law.

Given under my hand and seal, this —— day of ——, 192—.
J. T., J. P. [L. s.]

No. 12. CERTIFICATE TO BAIL, WHEN ACCUSED IS SURRENDERED TO A JUSTICE.

(Code, § 4983.)

—— county, to-wit:

This is to certify to whom it may concern, that O. P. was bound by recognizance as the surety and bail of C. D. for his appearance before the circuit court of said county, on the first day of the next —— term thereof, to answer the Commonwealth for a misdemeanor, in this, that he [here insert description of the offense as in the warrant of arrest]; of which offense the said C. D. was found guilty by me, and from my said judgment he appealed to the said circuit court; and that he, the said O. P., has this day taken the body of the said C. D. and surrendered him before me, J. T., a justice of said county, in discharge of his said recognizance, according to the law in such case made and provided.

Given under my hand, this —— day of ——, 192—.

J. T., J. F.

No. 13. NEW RECOGNIZANCE OF ACCUSED, WHEN SURRENDERED TO A JUSTICE.

(*Idem.*)

[Follow No. 9 to the condition, and conclude thus:]

Yet upon this condition, that whereas B. C. stood bound by recognizance as the surety and bail of the said C. D. for his appearance before the circuit court of said county, on the first day of the next ——— term thereof, to answer the Commonwealth for a misdemeanor, in this, that he [here insert description of the offense as in the warrant of arrest]; for which offense he was found guilty by me, and from which said judgment he appealed to the circuit court of said county; and the said B. C. has this day taken the body of the said C. D. and surrendered him before me, J. T., a justice of said county, in discharge of his said recognizance according to law; and whereas the said O. P. has undertaken before me, justice as aforesaid, as surety of the said C. C. for his appearance before the court aforesaid, on the first day of the next ——— term thereof, to answer the Commonwealth for the said offense, and that he, the said C. D., will not then depart from the said court without leave thereof: Now, if the said C. D. shall personally appear before the circuit court of said county, on the first day of the next ——— term thereof, to answer the Commonwealth for the said offense, whereof he stands charged as aforesaid, and shall not depart thence without leave of the said court, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written. J. T., J. P.

No. 14. ACKNOWLEDGMENT OF SATISFACTION FOR ASSAULT AND BATTERY, OR OTHER LIKE MISDEMEANOR.

(Code, §§ 4849-50.)

——— county, to-wit:

I, A. B., hereby acknowledge satisfaction for the injury I have sustained at the hands of C. D., now in jail (or *under recognizance*) to answer for a misdemeanor, in this, that he, on the ——— day of ———, 192—, in said county, did unlawfully assault and beat me, the said A. B. (or did some other misdemeanor, for which there is a remedy by civil action, as the case may be); and therefore pray that the commitment of the said C. D. be superseded (or *that the recognizance of the said C. D. be discharged*). This ——— day of ———, 192—.

A. B.

Acknowledged before me, J. T., a justice for ——— county, this ——— day of ———, 192—.

J. T., J. P.

1136 JUSTICE OF THE PEACE—*Recovery of Fines before J. P.*

No. 15. SUPERSEDEAS TO COMMITMENT FOR ASSAULT AND BATTERY, OR OTHER LIKE MISDEMEANOR.

(*Idem.*)

—— county, to-wit:

Whereas C. D. was committed to the jail of said county, by my warrant, dated on the —— day of ——, 192—, in said county, did unlawfully assault and beat A. B. (or did some other misdemeanor, for which there is a remedy by civil action, as the case may be); and whereas the said A. B. has this day personally appeared before me and acknowledged in writing that he has received satisfaction for the injury he sustained by virtue of the said offense, and has asked that the said commitment be superseded:

I therefore command you, in the name of the Commonwealth of Virginia, that if the said C. D. be detained in your jail for no other cause than that stated in my said warrant, that you forthwith discharge him from your custody.

Given under my hand, this —— day of ——, 192—.

J. T., J. P. [L. s.]

No. 16. ORDER DISCHARGING RECOGNIZANCE TO ANSWER FOR ASSAULT AND BATTERY, OR OTHER LIKE MISDEMEANOR.

(Code, §§ 3973-4.)

—— county, to-wit:

To the clerk of the circuit court of said county:

Whereas I, J. T., a justice for said county, on the —— day of ——, 192—, took a recognizance of C. D., himself in the sum of —— dollars, with O. P., his surety, in the like sum, conditioned for the personal appearance of the said C. D. before the circuit court of said county, on the first day of the next grand jury term thereof, to answer the Commonwealth for a misdemeanor, in this, that he, on the —— day of ——, 192—, did unlawfully assault and beat A. B. (or did some other misdemeanor, for which there is a remedy by civil action, as the case may be); and whereas the said A. B. has this day personally appeared before me and acknowledged in writing that he has received satisfaction for the injury he has sustained by virtue of the said offense, and has asked that the said recognizance be discharged, I do, therefore, hereby discharge the said recognizance.

Given under my hand and seal, this —— day of ——, 192—.

J. T., J. P. [L. s.]

VII. RECOVERY OF FINES BEFORE A JUSTICE

§ 1. Jurisdiction of fines not exceeding \$20

§ 2. To whom fines go

§ 3. Fines imposed by justices and mayor; security for; commitment for failure to pay

- § 4. Justice to certify fines to clerk; State liable for one-half only of fees of officers
- § 5. To whom fine paid
- § 6. Receipts for fines
- § 7. Forms

§ 1. Jurisdiction of fines not exceeding \$20.—By section 6015 of the Code, which gives a justice his jurisdiction of warrants for small claims, he is also given jurisdiction of “fines not exceeding \$20,” which, by section 2543 (amended by Acts 1920, p. 319) is recoverable by warrant. The proceedings thereupon are as in other cases of warrants for small claims (see heading “*Warrants for Small Claims*”, div. I., above); or as in the case of misdemeanors (see “*Trial of Misdemeanors before a justice*,” div. VI., above).

If the fine is imposed for a misdemeanor, an appeal lies under section 4989 of the Code. But if the fine is a mere pecuniary forfeiture, and not for a misdemeanor, an appeal lies only where the fine exceeds \$10, as in civil cases, under section 6027.

§ 2. To whom fines go.—Fines go to the Commonwealth, except where a statute allows a part to an informer and his name is endorsed on the warrant before service (Code, § 2543; Acts 1920, p. 319; § 2947).

§ 3. Fines imposed by justices and mayors, security for; commitment for failure to pay.—By section 2549 of the Code: “In any misdemeanor case tried before a justice of the peace, or in any case tried before a mayor of a town chartered under the general laws of this State, for the violation of a town ordinance, in which a fine is imposed on a defendant, or in which the defendant is required to pay the costs and the same is not paid, the justice, or the mayor, as the case may be, may, in his discretion, take security for payment of such fine and costs, or for the costs alone where there is no fine, such payment to be made within thirty days from the day of trial. It shall be sufficient to bind such surety that the justice or mayor before whom such case is tried endorses on the warrant the name of the surety, amount for which he is bound, and the date of the endorsement; but if no security is given, the defendant may be committed to jail until such fine and costs, or such costs alone, are paid. If security be given and payment

is not made to the clerk of the court, or in case the fine be imposed by the mayor of a town chartered as aforesaid, for the violation of a town ordinance, to the proper collecting officer of such town, the clerk of the court, where such fine is imposed by a justice, shall issue execution against the person against whom the judgment is rendered as well as against the surety, in the manner as provided by section 2552 of the Code; and when such fine is imposed by the mayor of the town, chartered as aforesaid, such mayor shall issue execution against the person against whom the judgment is rendered, as well as against the surety, as provided by section 3011 of the Code of Virginia; but in case the bond is not given as provided in this section, the justice or mayor, as the case may be, may commit the defendant to jail until the fine and costs are paid, or until the costs are paid, where there is no fine, unless sooner discharged by due course of law"—see §§ 4952-3.

It will be observed that this section says: "In any *misdemeanor* case," prior to 1900, it read, "when any *fine* is imposed." At common law a misdemeanor was any indictable offense, other than treason or felony. In Virginia, it is provided (section 4758) that all offenses, not felonies (i. e., not punishable by death or confinement in the penitentiary), are misdemeanors.

So it seems misdemeanors are all those offenses, not felonies, embraced in chapters 144 to 187 of the Code, and cases where the statute expressly denominates the offense a misdemeanor. A fine, on the other hand, by section 2577 of the Code, embraces any "pecuniary forfeiture, penalty, and amercement," thus including many acts of commission or omission, punishable by a fine or forfeiture, which could not properly be called an "offense," or a "misdemeanor."

Prior to 1900, the section said, "but he shall not issue any execution therefor." It would seem that a justice may now, under section 6029 issue execution for a fine, where no security is given, or he may commit to jail.

§ 4. Justice to certify fines to clerk; State liable for one-half only of fees of officers.—(See Code, § 2550.)

The clerk enters the fines in a book, and if unpaid issues an execution therefor; and if the execution is returned unsatisfied, the clerk issues a *capias pro fine* for the arrest of the defendant. (Code, §§ 2552, 2560.)

The justice must within 30 days, pay all fines and costs to the clerk—Code, § 2556.

§ 5. **To whom fine paid.**—The fine and costs should not be paid to the constable (except under execution), but to the justice; or to the clerk if the accused is in jail—Code, §§ 2555, 2562.

Constable or sheriff receiving fines and costs under an execution or *capias pro fine*, to pay same to clerk—Code, § 2568.

For act providing for official receipts for fines, Code, § 2546.

§ **Receipts for fines.**—For act providing for official receipts for fines, see Code, § 2546.

§ 7. **Forms.**—See *Warrants for Small Claims*, div. I., above.

VIII. PEACE AND GOOD BEHAVIOR

- § 1. Who, conservators of the peace; may bind to good behavior
 - (1) What persons are "not of good fame"
 - (2) Proceedings against persons "not of good fame"
- § 2. Their duty, on complaint that a crime is intended
- § 3. The proceeding, when accused appears
 - (1) "Good cause"
 - (2) Recognizance
 - (3) Forfeiture of recognizance
 - (4) Discharge of recognizance
- § 4. When appeal may be taken; witnesses to be recognized
- § 5. Power of court, when appeal taken
- § 6. Its power, when accused committed to jail
- § 7. When person going armed required to give recognizance, with right of appeal
- § 8. When court, or conservator, etc., may without proof or process require recognizance
 - Special police
- § 10. Surrender by surety of principal in recognizance
- § 11. Various forms under "Peace and Good Behavior"

§ 1. **Who conservators of the peace; may bind to good behavior.**—Section 4789 provides: "Every judge throughout the State and every justice, commissioner in chancery, notary, and county surveyor while in the performance of the duties of his office within his county or corporation shall be a conservator of the peace, and may require from persons not of

good fame security for their good behavior for a term not exceeding one year. It shall be the duty of every conservator of the peace to arrest without a warrant for felonies committed in his presence, or upon reasonable suspicion of felony, and for breaches of the peace and all misdemeanors of whatever character committed in his presence."

(1) *What persons are "not of good fame."*—The expression, "not of good fame," is so comprehensive and uncertain in its meaning as to leave much to the discretion of the conservator. In the exercise of a power so indefinite, he should act with great caution—falling short of, rather than exceeding, his authority—and not bind to good behavior for evil rumor in general; for rumor is too fallible to be relied on with safety, and good men are often maligned. But under the general words of the statute, he may bind for good behavior for the following causes: Haunting bawdy houses with women of bad fame; keeping such women in his own house; prostitution or lewdness of any kind; words in abuse of an officer of justice, especially when in the execution of his office; contempt of court; being a night-walker, eavesdropper, common scold, common drunkard, gamester, cheat, or idle vagabond; being a libeller or an author or a publisher of obscene books or pictures; keeping suspicious company; incurring the suspicion of being a robber; sleeping in the day and going abroad in the night; and other like instances of misbehavior, *contra bonos mores*, (against good morals), as well as *contra pacem*, (against the peace), that fall within the reasonable embrace of the statute.

(2) *Proceedings against persons "not of good fame."*—As to how persons "not of good fame" are required to find sureties for their good behavior, the statute is silent, and the proceedings are therefore as at common law. The conservator may, of his own motion, in the exercise of a sound judicial discretion, issue his warrant requiring a person known to him to be of evil fame to furnish security for his good behavior; but it would be a more prudent policy, in such cases, for him to be satisfied by evidence on oath, not only of the bad repute of the party, but that his conduct and actions have been so scandalous as to justify his interference. If, upon the hearing, the conservator finds good cause, he requires the

party to give a recognizance, payable to the Commonwealth, and in such sum and with such security as he may deem sufficient, conditioned to be of good behavior, specially, or generally towards the Commonwealth and all persons therein, for such time, not exceeding one year, as the conservator may direct. If he fails to furnish such recognizance, he is, for such default, committed to jail, and the commitment must express the cause thereof with convenient certainty, and care should be taken that the cause be a good one. (Code, § 4973.)

While the party has no right of appeal, as it seems, yet he may be discharged from jail, upon such recognizance being given before some conservator of the peace; or by the county or corporation court, on such terms as it may deem reasonable; or by serving out the time for which the recognizance was required.

Besides "persons not of good fame," surety for good behavior is particularly required by statute in certain cases.

§ 2. Their duty, on complaint that a crime is intended.—Section 4790 provides: "If complaint be made to any such conservator that there is good cause to fear that a person intends to commit an offense against the person or property of another, he shall examine on oath the complainant, and any witnesses who may be produced, reduce the complaint to writing, and cause it to be signed by the complainant; and if it appear proper, such conservator shall issue a warrant, reciting the complaint, and requiring the person complained of forthwith to be approached and brought before him or some other conservator."

The warrant may be directed to the sheriff or any constable, or even to a private citizen, who, however, is not compellable to serve it, and may be executed by breaking doors, and otherwise in the same manner, in all respects, as any other criminal process may be executed. An officer is justified in keeping the party in confinement for a reasonable time, upon his own authority, to enable him to find sureties before he takes him to the conservator, for a person solemnly charged on oath with an intention to commit an offense is at all events to be prevented in his purpose, while at the same time he should have the earliest opportunity of obtaining his liberty by finding sureties to keep the peace and be of good behavior. But

if the officer delays for an unreasonable time to carry him before a conservator, he is liable not only to indictment for such neglect, but to an action by the party for false imprisonment, and his warrant will afford him no justification. If the warrant be made returnable before the conservator issuing it, the officer should take the party before him; but if it be returnable before him or any other conservator of the county, the officer electing where to take him should, ordinarily, take him before the most convenient conservator, whose duty it is then to proceed in the matter, in all respects, as the warrant and law requires.

§ 3. **The proceeding, when accused appears.**—Section 4791 provides: "When such person appears, if the conservator, on hearing the parties, consider that there is not good cause for the complaint, he shall discharge the said person, and may give judgment in his favor against the complainant for his costs. If he consider that there is good cause therefor, he may require a recognizance of the person against whom it is, and give judgment against him for the costs of the prosecution, or any part thereof; and, unless such recognizance be given, he shall commit him to jail by a warrant, stating the sum and time in and for which the recognizance is directed. The person, giving judgment under this section for costs, may issue a writ of *feri facias* thereon, if an appeal be not allowed; and the proceedings thereupon may be according to sections 6030 and 6032"—as in case of a warrant for a small claim.

(1) "*Good cause.*"—As a general rule, recognizance should be required in all cases, if he who demands it makes oath that he is under actual fear of death or bodily harm, or of any other offense either against his person or property, and that he does not require the same from malice. But notwithstanding the oath, if the conservator believes that the application is made out of mere malice or for vexation only, without any just cause of fear, it should be denied.

As to what is good cause, the conservator may be safely advised that, if there does not exist such facts and circumstances as would warrant a cautious man in the belief that the accused intends to commit an offense against the person or property of another, he should dismiss the complaint; and if the complaint was malicious, frivolous, or unfounded, as it

often is, he should, in the exercise of that discretion wisely invested in him by statute, give judgment in favor of the defendant against the complainant for his costs.

(2) *Recognizance*.—The statute merely provides that if there be good cause the conservator “may require a recognizance,” without stating for what or the terms of it. This is done by section 4973 of the Code, which provides that the recognizance shall be payable to the Commonwealth and be in such sum and with such surety as the conservator may deem sufficient, on condition “to keep the peace and be of good behavior,” for such time, not exceeding one year, as the conservator may direct; and if the party be insane, a married woman, or minor, it may be taken of another person, without surety, if he be deemed sufficient (Code, § 4975).

Thus, the recognizance must be, not only to keep the peace towards all persons in the Commonwealth, and especially towards the complainant; but also to be of good behavior towards the Commonwealth and all persons therein.

The recognizance need not be signed or sealed by the parties to make it valid, for the certificate of the officer is sufficient proof of the acknowledgment; indeed, it becomes a debt of record as soon as it is entered into, even before it is formally drawn up; but when once framed, the officer should not afterward vary its terms.

The conservator must forthwith transmit any recognizance taken by him to the clerk of his circuit or corporation court (Code, § 4977).

(3) *Forfeiture of recognizance*.—Any recognizance for good behavior, or to keep the peace and be of good behavior, is forfeited for any of the following causes:

- (a) For being a person not of “good fame”;
- (b) For any “offense against the person or property of another”;
- (c) For any act of misbehavior which the recognizance was intended to prevent, but not for mere fresh cause of suspicion;
- (d) For any offense against the public peace, whether an actual breach of the peace or an act tending thereto, as an affray, riot, rout, unlawful assembly, carrying concealed weapon, going about armed with deadly or dangerous weapon

without just excuse, forcible entry or detainer of land, libel, or even challenging another to fight or menacing him in his presence. But mere words of reproach, as calling one a knave, liar, rascal, drunkard, or the like, will not forfeit the recognizance, for they are regarded as the effect of unreasoning heat and passion, unless, indeed they amount to a challenge to fight.

But if a recognizance for good behavior be only special, as it seems it may be when taken for good behavior, it is forfeited by such particular acts of misbehavior as was intended by the recognizance to be prevented.

If the recognizance be broken, the party may therefor be bound anew; but not until he is thereof convicted by due process of law; for until then "he standeth indifferent whether he hath forfeited his recognizance or not."

When forfeited, the proceeding upon the recognizance may be by *scire facias*, which is appropriate to enforce all obligations of record, or by action of debt (Code, § 4978 &c.).

(4) *Discharge of recognizance*—Besides an appeal as hereinafter provided, a recognizance is discharged by the death of the principal, if not before forfeited, but not by the death of the surety, whose personal representative continues bound as he was; or by the discharge of the party from the custody of the principal on writ of *habeas corpus*.

§ 4. When appeal may be taken; witnesses to be recognized.—Section 4792 provides: "A person from whom such recognizance is required may appeal to the circuit court of the county or corporation court of the corporation, and, in such case, the officer from whose judgment the appeal is taken shall recognize such of the witnesses as he thinks proper; provided, however, that the person taking the appeal may be required to give bail, with good security, for his appearance at the circuit court of the county or corporation court of the city."

§ 5. Power of court, when appeal taken.—Section 4793 provides: "The court may dismiss the complaint or affirm the judgment, and make what order it sees fit as to the costs. If it award costs against the appellant, the recognizance which he may have given shall stand as security therefor. When there is a failure to prosecute the appeal, such recognizance shall remain in force, although there be no order of affirm-

ance. On any appeal the court may require of the appellant a new recognizance if it see fit."

§ 6. Its power, when accused committed to jail.—Section 4794 provides: "Any person, committed to jail under this chapter, may be discharged by the circuit court of the county or corporation court of the corporation on such terms as it may deem reasonable."

§ 7. When person going armed required to give recognizance, with right of appeal.—Section 4795 provides: "If a person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance, with the right of appeal, as before provided, and like proceedings shall be had on such appeal."

If he fail to give the recognizance, he is committed to jail (Code, § 4976).

§ 8. When court, or conservator, &c., may, without process or proof, require recognizance.—Section 4796 provides: "If a person, in the presence of a court or a conservator of the peace, make an affray, or threaten to kill or beat another, or to commit violence against his person or property, or contend with angry words, to the disturbance of the peace, he may, without process or further proof, be required to give a recognizance."

If he fail to give the recognizance, he is committed to jail (Code, § 4976).

§ 9. Special police.—For provisions as to special police, see sections 4797 to 4805 of the Code and Acts 1922, amending §§ 4801, 4804-5.

For police at religious meetings, see *Disturbing Worship*, etc., section 3.

In counties of 25,000, adjoining one or more cities having a population in the aggregate of 100,000, the sheriff may appoint a special police force—see Acts 1922, p. —.

§ 10. Surrender by surety of principal in recognizance.—A surety in a recognizance may at any time take his principal and surrender him to any justice of the county or corporation, whereupon such surety is discharged from any further liability. The justice gives the surety a certificate of the surrender. Unless let to bail anew, the accused is committed to jail. (Code, §§ 4982-3.)

§ 11. Various forms under "Peace and Good Behavior."

No. 1. WARRANT FOR GOOD BEHAVIOR

(Code, § 4789.)

—— county, to-wit:

To X. Y., constable of said county:

Whereas A. B. has this day made complaint, on oath, before me, J. T., a justice (or *notary, commissioner in chancery, county surveyor, or judge of the —— court*) for said county, that C. D., of said county, is not of good fame and behavior, but is demeaning and conducting himself in a scandalous and disgraceful manner, contrary to good morals, and against the public peace, by [here state briefly the specific conduct complained of, as *haunting a bawdy-house with women of bad fame; being a common drunkard*; or other conduct under section 1, (1), above], and the said A. B. has prayed that the said C. D. give surety for his good behavior.

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend the said C. D. and bring him before me, to answer the said complaint and further to be dealt with according to law.

Given under my hand and seal, this the —— day of ——, 192—.

J. T., J. P. (or other conservator). [L. s.]

No. 2. RECOGNIZANCE FOR GOOD BEHAVIOR

(*Idem.*)

—— county, to-wit:

Be it remembered, that on this —— day of ——, 192—, C. D. and E. F., of said county, personally came before me, J. T., a justice (or other conservator) for said county, and severally acknowledged themselves to owe the Commonwealth of Virginia, the said C. D. the sum of —— dollars, and the said E. F. the sum of —— dollars of their respective goods and chattels, lands, and tenements, to be levied, and for the use of the Commonwealth rendered:

Yet upon this condition, that if the said C. D., shall, for the term of —— months (not exceeding twelve months) from the date hereof, be of good behavior towards the Commonwealth, and all persons therein [and add, in case of a *special* recognizance, "in respect to haunting bawdy-houses with women of bad fame," or as to any other conduct under section 1, (1), above], then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.

J. T., J. P. (or other conservator.)

No. 3. COMMITMENT FOR FAILURE TO RECOGNIZE FOR GOOD BEHAVIOR
(Code, §§ 4973, 4976.)

—— county, to-wit:

To X. Y., constable of said county, and to the keeper of the jail of said county:

Whereas C. D. was this day brought before me, J. T., a justice (or other conservator) for said county, by virtue of a warrant issued by me upon the complaint on oath of A. B., and was required by me, the said justice, to recognize, with sufficient surety, in the sum of —— dollars, for his good behavior for a term of —— months (not exceeding twelve months) from this day, towards this Commonwealth, and all persons therein [and add, if the recognizance required was *special*, "in respect to haunting bawdy-houses with women of bad fame," or other conduct under section 1, (1), above]; and whereas the said C. D. has failed to give such recognizance:

These are, therefore, in the name of the Commonwealth of Virginia, to command you, the said constable, forthwith to convey the said C. D. to the jail of said county, and there deliver him, together with this warrant to the keeper thereof; and I command you, the said keeper, to receive the said C. D. into your custody in the said jail, and him there safely keep for the said term of —— months from the date hereof, unless in the meantime he shall give such recognizance or be otherwise discharged by due course of law.

Given under my hand and seal, this —— day of ——, 192—.
J. T., J. P. (or other conservator). [L. s.]

No. 4. COMPLAINT ON OATH OF AN INTENDED OFFENSE AGAINST ONE'S PERSON OR PROPERTY
(Code, §§ 4789-90, 4793.)

I, A. B., of —— county, to hereby make complaint on oath, before J. T., a justice (or *notary, commissioner in chancery, county surveyor, or judge of the —— court*) for said county, that C. D., on the —— day of ——, 192— (or, *and at divers other times*), in said county, did declare and threaten that he would [here state the threats] by reason whereof I fear he will do me some grievous bodily injury (or *burn my house* or commit some other offense against my property, as the case may be), and therefore I pray that the said C. D. may be required to recognize to keep the peace and be of good behavior according to law. I do not make said complaint out of malice, hatred, or ill-will, but merely for the preservation of my person (or *property*) from injury.

This —— day of ——, 192—.

A. B.

Subscribed and sworn to before me, J. T., a justice (or other conservator) for —— county, this ——, day of ——, 192—.

J. T., J. P. (or other conservator).

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No. 5. WARRANT FOR PEACE AND GOOD BEHAVIOR, UPON THE FOREGOING COMPLAINT

(Code, § 4790.)

—— county, to-wit:

To X. Y., constable of said county:

Whereas A. B. has this day complained on oath, before me, J. T., a justice (or *notary, commissioner in chancery, county surveyor, or judge of the —— court*) for said county, that C. D., of said county, on the —— day of —— 192—, did threaten to beat him (or to *burn his house or to poison his horse*, or to do any other injury to his person or property, according to the fact) and the said A. B. has prayed that the said C. D. be required to recognize to keep the peace and be of good behavior:

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend the said C. D. and bring him before me, or some other conservator of said county, to answer the said complaint, and further to be dealt with according to law.

Given under my hand and seal, this —— day of ——, 192—.

J. T., J. P. (or other conservator). [L. s.]

If the warrant be issued under section 4795, use the above form, but instead of "did threaten to beat him," say, "did go armed with a deadly and dangerous weapon, to-wit: [here state what weapon], the said C. D. not then having any reasonable cause to fear violence to his person, family, or property."

No. 6. JUDGMENT REQUIRING RECOGNIZANCE FOR PEACE AND GOOD BEHAVIOR IN ANY CASE, AND ALLOWING APPEAL

(Code, § 4791.)

The within complaint was this day heard, and the defendant required to recognize, with good surety, in the sum of —— dollars, to keep the peace and be of good behavior for —— months from this day, and to pay —— dollars, the cost of prosecution; and having given the recognizance required, he is discharged (or *not having given the recognizance required, he is committed to the jail of —— county*).

This ——, day of ——, 192—.

J. T., J. P. (or other conservator).

If an *appeal* be taken, use the above form, but in lieu of "and having given the recognizance required," &c., say: "and the said C. D. having prayed an appeal from my said judgment, the same is hereby granted him to the circuit court of —— county; and he having entered into a recognizance for his appearance at the next term of the said court, upon the hearing of said appeal, he is discharged."

No. 7. RECOGNIZANCE UPON APPEAL

(Code, § 4792.)

[Follow No. 2, to the condition, and conclude thus:]

Yet upon this condition, that whereas the said C. D. was, upon the complaint on oath of A. B., and the testimony of him and other witnesses, this day required to give recognizance, with sufficient surety, in the sum of ——— dollars, to keep the peace and be of good behavior (or *to be of good behavior*, if that be the case) towards the said A. B. and all the people of the Commonwealth, for the term of ——— months; and whereas the said C. D. did then and there pray an appeal from my said judgment, which was granted him to the circuit court of ——— county:

Now if the said C. D. shall personally appear before the said circuit court on the first day of the next ——— term thereof, upon the hearing of the said appeal, and shall not depart thence without leave of the said court, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.

J. T., J. P.

No. 8. JUDGMENT DISMISSING THE COMPLAINT

(*Idem.*)

The within complaint was this day heard and dismissed (*and judgment given in favor of C. D. against the complainant A. B. for ——— dollars cost, if that be the judgment.*)

This ——— day of ——— 192—.

J. T., J. P. (or other conservator).

No. 9. RECOGNIZANCE FOR PEACE AND GOOD BEHAVIOR IN ANY CASE

(Code, §§ 4791, 4795-6, 4975-7.)

[Follow No. 2, to the condition, and conclude thus:]

Yet upon this condition, that if the said C. D. shall keep the peace and be of good behavior towards all the persons of this Commonwealth, and especially towards A. B., for the term of ——— months (not exceeding twelve months) from the date hereof, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in the said county, the day and year first above written.

J. T., J. P. (or other conservator).

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No. 10. COMMITMENT FOR FAILURE TO RECOGNIZE TO KEEP THE PEACE
AND BE OF GOOD BEHAVIOR

(*Idem.*)

—— county, to-wit:

To X. Y., constable of said county, and to the keeper of the jail of said county:

Whereas C. D. is now brought before me, J. T., a justice (or other conservator) for said county, upon the complaint on oath of A. B., and is required by me to give recognizance, with sufficient surety, in the sum of —— dollars, to keep the peace and be of good behavior for the term of —— months, towards all persons of this Commonwealth, and especially towards the said A. B., and whereas the said C. D. has failed to give before me, the said justice, such recognizance:

These, are, &c. [concluding as in No. 3].

If the commitment be under section 4796, use the above form; but instead of "is now brought before me * * * upon the complaint on oath of A. B.," insert the following: "did, in the presence of myself, J. T., a justice (or other conservator) for said county, make an affray (or threaten to beat one O. R., or contend with angry words with one O. R., or as the case may be), to the disturbance of the peace."

No. 11. RECOGNIZANCE GIVEN AFTER COMMITMENT

(Code, § 4976.)

[Follow No. 2, to the condition, and conclude thus:]

Yet upon this condition, that whereas the said C. D. was, upon the complaint on oath of A. B., by the warrant of J. S., a justice (or other conservator) for said county, committed to the jail of said county, on the —— day of ——, 192—, for not giving the required recognizance, in the sum of —— dollars, to keep the peace and be of good behavior (or to be of good behavior, if that be the case) towards all the people of this Commonwealth, and especially towards the said A. B., for —— months, and the said recognizance is now given with the said E. F. as surety:

Now, if the said C. D. shall keep the peace and be of good behavior (or be of good behavior, if that be the case) towards all the people of this Commonwealth and especially towards the said A. B., for the term of —— months from this day, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.

J. T., J. P. (or other conservator), [I. s.]

No. 12. ORDER DISCHARGING A PRISONER WHEN RECOGNIZANCE HAS
BEEN GIVEN

(*Idem.*)

—— county, to-wit:

To the keeper of the jail of said county:

If detained for no other cause, discharge C. D., imprisoned in your jail, on the complaint of A. B., for failing to give the required recognizance, in the sum of —— dollars, to keep the peace and be of good behavior (or *to be of good behavior*, if that be the case) towards all the people of this Commonwealth, and especially towards the said A. B., for the term of —— months, the said recognizance, with E. F. as surety, having this day been given before me, J. T., a justice (or other conservator, and he need not be the one who committed him) for said county, in the sum of —— dollars, to keep the peace and be of good behavior towards all the people of this Commonwealth, and especially towards A. B., for the term of —— months now next ensuing.

Given under my hand and seal, this —— day of —— 192—.

J. T., J. P. (or other conservator). [L. s.]

No. 13. COMMITMENT WHEN A PRINCIPAL IS SURRENDERED BY HIS
SURETY TO A JUSTICE

(Code, §§ 4982-3.)

—— county, to-wit:

To X. Y., constable of said county, and to the keeper of the jail of said county:

Whereas E. F. stands bound as surety in the sum of —— dollars in the recognizance of C. D., to keep the peace and be of good behavior (or *to be of good behavior*, if that be the case) towards all the people of this Commonwealth, and especially towards A. B., for the term of —— months, and the said E. F. has this day taken the body of the said C. D. and surrendered him before me, J. T., a justice for said county, in discharge of his said recognizance, and the said C. D. has failed to furnish further recognizance, in the sum of —— dollars, to keep the peace and be of good behavior (or *to be of good behavior*, if that be the case) towards all the people of this Commonwealth, and especially towards the said A. B., for the residue of the said term of —— months, to-wit, for —— months and —— days:

These are, &c. [concluding as in No. 3].

No. 14. NEW RECOGNIZANCE WHEN PRINCIPAL IS SURRENDERED BY
SURETY BEFORE A JUSTICE

(*Idem.*)

[Follow No. 2 to the condition, and conclude thus]:

Yet upon this condition, that whereas B. C. stood bond as surety in

the sum of ——— dollars, in the recognizance of C. D. to keep the peace and be of good behavior (or *to be of good behavior*, if that be the case) towards all the people of this Commonwealth, and especially towards A. B., for the term of ——— months, and the said B. C. has this day taken the body of the said C. D. and surrendered him before me, J. T., a justice for said county, in discharge of his said recognizance according to law; and whereas the said E. F. has this day undertaken before me, justice as aforesaid, that the said C. D. will keep the peace and be of good behavior (or *be of good behavior*, if that be the case) towards all the people of this Commonwealth, and especially towards the said A. B., for the residue of the said term, to-wit, for ——— months and ——— days:

Now, if the said C. D. shall keep the peace and be of good behavior (or *be of good behavior*, if that be the case) towards all the people of this Commonwealth, and especially towards the said A. B., for the said term of ——— months from the date hereof, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written. J. T., J. P.

No. 15. CERTIFICATE TO SURETY, WHEN PRINCIPAL IS SURRENDERED TO
A JUSTICE

(*Idem.*)

——— county, to-wit:

This is to certify to whom it may concern, that E. F. was bound as surety in the sum of ——— dollars in the recognizance of C. D. to keep the peace and be of good behavior (or *to be of good behavior*, if that be the case) towards all the people of this Commonwealth, and especially towards A. B., for the term of ——— months, and that the said E. F. has this day taken the body of the said C. D. and surrendered him before me, J. T., a justice for said county, in discharge of his said recognizance, according to the law in such case made and provided.

Given under my hand, this ——— day of ———, 192—.

J. T., J. P.

IX. SEARCH WARRANTS

§ 1. When justice may issue search warrant

§ 2. New act as to search warrants

- (1) Specific affidavit required; same to be certified to clerk of court; general search warrants prohibited.
- (2) How warrant directed; what it shall command
- (3) What to be done with property seized

- (4) Searches without such warrant a misdemeanor; also liability in compensatory and punitive damages; second offense forfeits office; certain exceptions as to game laws and intoxicating liquors
- (5) Justice violating law guilty of misfeasance or malfeasance
- § 3. What to be done with person taken
- § 4. Search warrants in liquor cases
 - (1) For ardent spirits being manufactured, sold kept stored or concealed
 - (2) For ardent spirits being transported in wagon, boat, buggy, automobile or other vehicle
- § 5. Various forms under "Search Warrants"

§ 1. **When justice may issue search warrant.**—Upon proper specific affidavit filed of personal property stolen, embezzled, or obtained by false pretense, and that it is believed to be concealed in a particular house or other place; or upon like affidavit, as to counterfeit coin, forged bank notes, and other writings, etc., obscene books, pictures, etc., lottery tickets, gaming apparatus, etc., a justice, if satisfied there is reasonable cause therefor, issues a search warrant. (Code, §§ 4819-20; Acts 1920, p. 516.)

For when a justice may issue a search warrant in liquor cases, see section 4, below.

§ 2. **New act as to search warrants.**—By Acts 1920, p. 516, it is provided as follows:

(1) *Specific affidavit required; same to be certified to clerk of court; general search warrants prohibited.*—"No search warrant shall be issued under any statute whatever which has heretofore been or which may at this session of the General Assembly be enacted, or by reason of the common law, until there is filed with the officers now authorized to issue the same an affidavit of some person reasonably describing the house, place, vehicle or baggage to be searched, the things to be searched for thereunder, alleging briefly the material facts constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which said search is to be made. Such affidavit shall be certified by the justice, judge or court issuing such warrant to the county clerk of his county or to the court clerk, admitting deeds to record, of his city and shall by such clerk be preserved as a record and shall at all times be subject to inspection

by the public. No such warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued by any justice, judge or court."

(2) *How warrant directed; what it shall command.*—"Every search warrant shall be directed to some officer now authorized by law to execute the same [the sheriff, sergeant, policeman or constable—see Code, § 4821], and shall command him to search the house, place, vehicle, or baggage or thing designated, either in day or night, and seize the property mentioned in such affidavit, and bring the same and the person or persons in whose possession the same are found before a justice or court having jurisdiction of the offense in relation to which such warrant was made; provided, that in cities and towns having a police force the warrant may also be directed 'to any policeman of said city or town' and shall be executed by the policeman or other officer into whose hands it shall come or be delivered." (See Code, § 4821.)

(3) *What to be done with property seized.*—"If any such warrant be executed by the seizure of property, the said property shall be safely kept as now required and directed by law, to be used as evidence, and thereafter be disposed of as provided by law; provided, however, that any such property seized under such warrant which is stolen or embezzled property shall be restored to its owner as soon as there is no further need for its use as evidence, unless it is otherwise expressly provided by law." (See Code, § 4822.)

But if it should appear, upon the return of the warrant, that the goods seized were not stolen or embezzled, they should be at once restored to the possessor; otherwise they must be disposed of as directed by the statute.

(4) *Searches without such warrant a misdemeanor; also liability in compensatory and punitive damages; second offense forfeits office; certain exceptions as to game laws and intoxicating liquors.*—"It shall be unlawful for any officer of the law or any other person to search any house, place, vehicle, baggage or thing except by virtue of and under a warrant issued by the proper officer. Any officer or other persons searching any house, place, vehicle, or baggage otherwise than by virtue of and under a search warrant, shall be deemed

guilty of a misdemeanor and be fined not less than fifty dollars nor more than five hundred dollars or be confined in jail not less than one month nor more than six months, or both, in the discretion of the justice, jury or court trying the same. Any officer or person violating the provisions of this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages. Any officer found guilty of a second offense under this section shall, upon conviction thereof, in addition to the penalty hereinbefore provided, immediately forfeit his office, and such conviction shall be deemed to create a vacancy in such office to be filled according to law.

Provided, however, any officer empowered to enforce the game laws and the laws with reference to intoxicating liquors may without a search warrant enter for the purposes of police inspection any freight yard or room, passenger depot, baggage room or warehouse, storage room or warehouse, train, baggage car, passenger car, express car, Pullman car, freight car, boat or other vehicle of any common carrier, boat, automobile or other vehicle; but nothing in this proviso contained shall be construed to permit a search warrant of any occupied berth or compartment on any passenger car or boat or of any baggage, bag, trunk, box or other closed container without a search warrant." (For further provision as to intoxicating liquors, see *Intoxicating Liquors*, sections 51 and 52.)

(5) *Justice violating law guilty of misfeasance or malfeasance.*—"Any justice wilfully and knowingly issuing a general search warrant, or a search warrant without the affidavit required by section one (1) of this statute, shall be deemed guilty of a misfeasance or malfeasance."

(6) *Conflicting acts repealed.*—"All acts or parts of acts in conflict herewith are hereby repealed."

§ 3. What to be done with person taken.—If upon the return of the warrant, before the justice, it appears that the goods were not stolen, the party in whose custody they are is discharged; if stolen by another, he is discharged, and recognized to give evidence against the thief; but if he received them, knowing they were stolen, or was the thief himself, he should be tried, or else committed or recognized to answer for the offense before the circuit or corporation court, as in other cases. (H's G. & M., p. 467.)

§ 4. Search warrants in liquor cases.—

(1) *For ardent spirits being manufactured, sold, kept, stored or concealed.*—Upon proper affidavit as described in section 2, (1), above, that “ardent spirits are being manufactured, sold, kept, stored, or in any manner held, used or concealed in a particular house, or other place, in violation of law, the justice of the peace, police justice, circuit or city judge and mayor of any city or town to whom complaint is made, if satisfied that there is reasonable cause for such belief, shall issue a warrant to search such house or other place for the ardent spirits”—see *Intoxicating Liquors*, section 15.

Such warrant for the search of any trunk, grip, baggage, or other thing, or place, may be executed in any part of the Commonwealth where the ardent spirits are overtaken. (See *Intoxicating Liquors* section 52.

(2) *For ardent spirits being transported in wagon, boat, buggy, automobile or other vehicle*—Under the law as amended by acts 1922, search may be made without a warrant—see *Intoxicating Liquor*, section 51.

§ 5. Various forms under “Search Warrants.”—**No. 1. AFFIDAVIT FOR SEARCH WARRANT FOR MONEY STOLEN, EMBEZZLED, OR OBTAINED BY FALSE PRETENSES.**

(Acts 1920, p. 516; Code, §§ 4819-21.)

Virginia, County (or *City or Town*) of ———, to-wit:

This day A. B. personally appeared before me, J. T., a justice of the peace (or *police justice or civil and police justice or mayor or circuit or city judge*) for said county (or *city or town*), and made complaint, oath, and affidavit that on the ——— day of ———, 192—, (or *within ——— days last past*), the following personal property was stolen (or *embezzled or obtained by false pretenses*—here reasonably describe the goods), of the goods and chattels of the said A. B.; that one C. D. (here state briefly the material facts constituting the probable cause for the issuance of the search warrant), whereby and from other facts the said A. B. has probable cause to believe that the said C. D. has the said property in the said dwelling house (or *barn or other place*) of the said C. D., (or *in a wagon or buggy or automobile or boat being driven and run by the said C. D.*), at ———, in said county (or *city or town*). Given under my hand, this the ——— day of ———, 192—.

J. T., J. P. (or other officer).

No. 2. AFFIDAVIT FOR SEARCH WARRANT FOR INDECENT BOOKS, PICTURES, PRINTS, ETC.

(Idem; Code, § 4549.)

Virginia, County (or *City or Town*) of ———, to-wit:

This day A. B. personally appeared before me, J. T., a justice of the peace (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge) for said county (or *city or town*), and made complaint, oath, and affidavit that C. D. has in his possession in his dwelling house (or *store* or other place), at ——— in said county (or *city or town*) certain books containing obscene language, entitled ——— (or *certain obscene and indecent prints, figures, pictures, and descriptions, representing—state what*), manifestly tending to corrupt the morals of youth, and which are intended to be sold, loaned, circulated, distributed, and introduced into a family, school, or place of education, by the said C. D., whereby and from other facts the said A. B. has probable cause to believe the said charge to be true. Given under my hand, this the ——— day of ———, 192—.

J. T., J. P. (or other officer),

No. 3. AFFIDAVIT FOR SEARCH WARRANT FOR GAMING APPARATUS AND IMPLEMENTS

(Idem; § 4676.)

Virginia, County (or *City or Town*) of ———, to-wit:

This day A. B. personally appeared before me, J. T., a justice of the peace (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge) for said county (or *city or town*), and made oath and affidavit that C. D. has in his possession in his dwelling house (or *hotel* or *store* or other place), at ———, in said county (or *city or town*), a certain gaming apparatus and implement, to-wit: a wheel of fortune (or *slot machine* or *pigeon hole table* or *Jennie Lynn table*, or other gaming table or bank, whether it has a name or not), there kept and provided to be used, and used, in unlawful gaming in said dwelling house (or other place), where persons resort for that purpose, whereby and from other facts the said A. B. has probable cause to believe the said charge to be true. Given under my hand, this the ——— day of ———, 192—.

J. T., J. P. (or other officer),

No. 4. AFFIDAVIT FOR SEARCH WARRANT FOR ARDENT SPIRITS BEING MANUFACTURED, SOLD, KEPT, STORED, OR CONCEALED IN ANY PLACE

(Idem; Acts 1918, page 577, § 22; Pocket Code, § 4612.)

Virginia, County (or *City or Town*) of ——— to-wit:

This day A. B. personally appeared before me, J. T., a justice of

the peace (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge), for said county (or *city* or *town*), and made complaint, oath, and affidavit that C. D., within twelve months last past did (here state briefly the material facts constituting the probable cause for the issuance of the search warrant), whereby and from other facts the said A. B. has probable cause to believe that ardent spirits have been and are now being manufactured, sold, kept, stored, held, used and concealed in his dwelling house (or *barn* or other place or in a *wagon* or *buggy* or *boat* or *automobile* or other vehicle, *driven and run by the said C. D.*), at ———, in said county (or *city* or *town*), in violation of law.

Given under my hand, this the ——— day of ———, 192—.

J. T., J. P. (or other officer),

No. 5. AFFIDAVIT FOR SEARCH WARRANT FOR ARDENT SPIRITS BEING TRANSPORTED IN WAGON, BOAT, BUGGY, AUTOMOBILE, OR OTHER VEHICLE

(Idem; Acts 1922, p. 345, § 57.)

Virginia, County (or *City* or *Town*) of ———, to-wit:

This day A. B. personally appeared before me, J. T., a justice of the peace (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge) for said county (or *city* or *town*), and made complaint, oath, and affidavit that C. D., within twelve months last past, did (here state briefly the material facts constituting the probable cause for the issuance of the search warrant), whereby and from other facts the said A. B. has probable cause to believe that the said C. D. is transporting in a certain wagon (or *boat* or *buggy* or *automobile* or other vehicle) *driven and run by the said C. D.*, in said county (or *city* or *town*), ardent spirits, contrary to law. Given under my hand, this the ——— day of ———, 192—.

J. T., J. P. (or other officer),

Such search may now be made without a warrant—Acts 1922, ch. 345, § 57.

No. 6. SEARCH WARRANT FOR MONEY STOLEN, EMBEZZLED, OR OBTAINED BY FALSE PRETENSES

(Acts 1920, p. 516; Pocket Code Paster Amendments 1920, §§ 4819-22-a; Code §§ 4819-21.)

Virginia, County (or *City* or *Town*) of ———, to-wit:

To X. Y., sheriff or *sergeant* or *constable* or *policemen*) of said county (or *city* or *town*):

Whereas A. B. has this day made complaint, oath, and affidavit before me, J. T., a justice of the peace (or *police justice* or *civil*

and *police justice* or *mayor* or *circuit* or *city judge*) for said county (or *city* or *town*), for a search warrant according to the statute in such case made and provided, and the said affidavit has been by me duly certified, as provided by law, to the clerk of the circuit (or *corporation*) court of said county (or *city*):

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith, in the night or day time, to enter the dwelling house (or *barn* or other place) of the said C. D. (or in a *wagon* or *buggy* or *automobile* or *boat* or other vehicle *driven and run by the said C. D.*), at ———, in said county (or *city* or *town*), and there diligently to search for certain personal property, viz., (here reasonably describe the property to be searched for), which said property is charged to have been stolen from and to belong to the said A. B., and now to be hid and concealed in the said dwelling house (or other place); and if the same or any part thereof shall be found upon such search, that you seize the said property and bring the same, and also the body of the said C. D., before me or some other justice (or *police justice* or *civil and police justice* or *mayor* or *circuit* or *city judge*) of said county (or *city* or *town*), to be disposed of and dealt with according to law.

Given under my hand and seal, this the ——— day of ———, 192—.

J. T., J. P. (or other officer). (L. S.)

No. 7. SEARCH WARRANT FOR INDECENT BOOKS, PICTURES, PRINTS, ETC.

(Idem, Code, § 4559.)

Virginia, County (*City* or *Town*) of ———, to-wit:

To X. Y., sheriff (or *sergeant* or *constable* or *policeman*) of said county (or *city* or *town*):

Whereas A. B. has this day made complaint, oath, and affidavit before me, J. T., a justice of the peace (or *police justice* or *civil and police justice* or *mayor* or *circuit* or *city judge*) for said county (or *city* or *town*), for a search warrant according to the statute in such case made and provided, and the said affidavit has been by me duly certified, as provided by law, to the clerk of the circuit (or *corporation*) court of said county (or *city*);

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith, in the night or day time, to enter the dwelling house (or *store* or other place) of one C. D., at ———, in said county (or *city* or *town*), and there diligently search for certain books containing obscene language, entitled ——— (or *certain obscene and indecent prints, figures, pictures, and descriptions, representing—*state what), manifestly tending to corrupt the morals of youth, and which are intended to be sold, loaned, circulated, distributed, and introduced into a family, school, or place of education; and if the same shall be found upon such search, that you seize the said books

(or *prints, figures, pictures, and descriptions*), and bring the same and also the body of the said C. D., before me or some other justice (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge) of said county (or *city or town*), to be disposed of, and dealt with according to law.

Given under my hand and seal, this the ——— day of ———, 192—. J. T., J. P. (or other officer). (L. S.)

NO. 8. SEARCH WARRANT FOR GAMING APPARATUS AND IMPLEMENTS.

(Idem; Code, § 4876.)

Virginia, County (or *City or Town*) of ———, To-wit:

To X. Y., sheriff (or *sergeant* or *constable* or *policeman*) of said county (or *city or town*);

Whereas A. B. has this day made complaint, oath, and affidavit before me, J. T., a justice of the peace (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge) for said county (or *city or town*), for a search warrant according to the statute in such case made and provided, and the said affidavit has been by me duly certified, as provided by law, to the clerk of the circuit (or *corporation*) court of said county (or *city*):

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith, in the night or day time, to enter the dwelling house (or *hotel* or *store* or other place), at ———, in said county (or *city or town*), and there diligently search for certain gaming apparatus and implements, to-wit: a wheel of fortune (or *slot machine* or *pigeon hole table* or *Jennie Lynn table*, or other gaming table or bank, whether it has a name or not), there kept and provided to be used, and used, in unlawful gaming in said dwelling house (or other place), where persons resort for that purpose; and if the same shall be found upon such search, that you seize the said gaming apparatus and implements and bring the same, and also the body of the said C. D., before me or some other justice (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge) of said county (or *city or town*), to be disposed of and dealt with according to law.

Given under my hand and seal, this the ——— day of ———, 192—. J. T., J. P. (or other officer). (L. S.)

NO. 9. SEARCH WARRANT FOR ARDENT SPIRITS BEING MANUFACTURED, SOLD, STORED, OR CONCEALED IN ANY PLACE.

(Idem; Acts 1918, p. 577, § 22; Pocket Code, § 4612.)

To X. Y., sheriff (or *sergeant* or *constable* or *policeman*) of said county (or *city or town*):

Whereas A. B. has this day made complaint, oath, and affidavit

before me, J. T., a justice of the peace (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge) for said county (or *city* or *town*), for a search warrant according to the statute in such case made and provided, and the said affidavit has been by me duly certified, as provided by law, to the clerk of the circuit (or *corporation*) court of said county (or *city*):

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith, in the night or day time, to enter the dwelling house (or *barn* or other place; or a *wagon* or *boat* or *buggy* or *automobile* or other vehicle, *driven and run by the said C. D.*), in said county (or *city* or *town*), and there diligently search for ardent spirits therein charged to have been, within twelve months last past, and are now being, manufactured, sold, kept, stored, held, used, and concealed, in violation of law; and if the same shall be found upon such search, that you seize the said ardent spirits and their containers and all other things then and there apparently used in violation of law, and bring the same, and also the body of the said C. D., before me or some other justice (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge) of said county (or *city* or *town*), to be disposed of and dealt with according to law.

Given under my hand and seal, this the ——— day of ———, 192—.

J. T., J. P. (or other officer). (L. S.)

No. 10. SEARCH WARRANT FOR ARDENT SPIRITS BEING TRANSPORTED IN WAGON, BOAT, BUGGY, AUTOMOBILE, OR OTHER VEHICLE

(Idem; Acts 1922, ch. 345, § 57.)

Virginia, County (or *City* or *Town*) of ———, To-wit:

To X. Y., sheriff (or *sergeant* or *constable* or *policeman*) of said county (or *city* or *town*):

Whereas A. B. has this day made complaint, oath, and affidavit before me, J. T., a justice of the peace (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge) for said county (or *city* or *town*), for a search warrant according to the statute in such case made and provided, and the said affidavit has been by me duly certified, as provided by law, to the clerk of the circuit (or *corporation*) court of said county (or *city*):

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith, in the night or day time, to enter a certain wagon (or *boat* or *buggy* or *automobile* or other vehicle) driven and run by the said C. D., in said county (or *city* or *town*), and there diligently search for ardent spirits being transported therein contrary to law; and if the same shall be found upon such search, that you seize the said ardent spirits and their containers and all other things then and there apparently used in violation of law, and bring the same, and also the body of the said C. D., before me or

some other justice (or *police justice* or *civil and police justice* or *mayor* or circuit or city judge) of said county (or city or town), to be disposed of and dealt with according to law.

Given under my hand and seal, this the _____ day of _____, 192—
J. T., J. P. (or other officer). (L. S.)

Such search may now be made without a warrant—Acts 1922, ch. 345, § 57.

X. COSTS BEFORE A JUSTICE

(Mining communities of 5,000 population to an area of 3 square miles, may pay a justice a salary in addition to his fees, both not exceeding \$75 per month. See Acts 1918, p. 555.)

- § 1. Costs before a justice in criminal cases
 - (1) Fees of a justice
 - (2) Fees of a sheriff, sergeant, coroner, crier, or constable
 - (3) When fees of justice, constable, sheriff, or sergeant paid by State
 - (4) Allowance to witness for the Commonwealth
- § 2. Costs before a justice in civil cases
 - (1) Fees of a justice
 - (2) Fees of sheriff, sergeant, crier, coroner, or constable
 - (3) To whom fees chargeable; how collected
- § 3. Various forms under "Costs before a Justice"

§ 1. Costs before a justice in criminal cases.—

(1) *Fees of a justice.*—By section 3507, as amended by Acts "In counties and towns and in cities of less than 25,000 inhabitants as shown by the last U. S. census, the fees of justices of the peace shall be as follows:

For issuing warrant of arrest	\$1.00
For trying or examining a case of misdemeanor	2.00
For examining a charge of felony	2.00
For admitting any person to bail	1.00
Provided, however, in no case [of bail] shall this payment be made out of the State treasury.	

For issuing a search warrant	1.00
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In cities of 25,000 or more inhabitants as shown by the last U. S. census, the fees of the justices of the peace shall be as follows:

For issuing a warrant of arrest	\$.50
For trying or examining a case of misdemeanor	1.00

For examining a charge of felony	\$ 1.00
For admitting any person to bail	1.00
Provided however in no case [of bail] shall this payment be made out of the State treasury.	
For issuing a search warrant	1.00

"No justice in any county, city, or town shall issue more than one warrant against a number of persons charging them separately with an offense of the same nature (a justice shall include in one warrant the names of all parties defendant charged with an offense of the same nature committed at the same time), nor shall a justice receive more than one fee for issuing more than one warrant of arrest or search warrant or trying or examining more than one case of misdemeanor, or examining more than one charge of felony against the same party defendant, when several warrants are issued or trials or examinations had on the same day.

"The said fees shall be in full for all services rendered in each case by a justice, but shall not be allowed or paid by the auditor of public accounts without a certificate of the judge of the court allowing the account that he has actually examined the papers upon which the account is founded and is satisfied that the warrant was issued and trial had or examination made, as shown in the account. The police justice of a city or other justice having similar jurisdiction and receiving a salary shall not be entitled to receive out of the State treasury the fees provided in this section, but every such justice shall be paid by the city for which he is employed. But if any such warrant of arrest for a misdemeanor or felony, or a search warrant, be had or procured at the instance of a prosecutor (other than a public officer charged with the enforcement of the laws) and be dismissed or the accused discharged from accusation, the justice or justices before whom the proceeding is, may give judgment against the prosecutor in favor of the accused for his cost, and must do so, if the justice or justices believe from the evidence that said proceeding was procured by said prosecutor through malice or without reasonable and probable cause."

(2) *Fees of a sheriff, sergeant, coroner, crier, or constable.*—By section 3508 of the Code, as amended by Acts 1918, page 627, they are allowed the following fees:

(1) For serving a warrant or summons other than a witness where no arrest is made, 60c.

(2) For an arrest in case of misdemeanor, \$1.00.

(3) For an arrest in a case of felony, \$1.50.

(4) For executing a search warrant, \$1.00.

(5) For summoning a witness in a felony case, 40c; for summoning a witness in a misdemeanor case, 50c. But not more than seventy-five cents shall be allowed out of the treasury for summoning witnesses in a case of misdemeanor, upon the trial of such misdemeanor before a justice, nor more than one dollar in a case of felony, unless the justice shall certify that the witnesses in a case of felony, in excess of five, were examined on the trial and were material witnesses; and when two or more persons are arrested under one warrant, or are jointly charged or tried, the officer shall be entitled only to such fees for summoning witnesses as if only one person was arrested, charged or tried.

(6) For carrying a prisoner to jail under the order of a justice, for each mile traveled by himself in going and returning, 8c.

(7) For each mile traveled with the prisoner in carrying him to jail, where the distance is over ten miles, 8c.

(8) For board of prisoner while under arrest and undergoing examination on a charge of felony, or while carrying him to jail, the amount actually paid by such officer, not exceeding one dollar per day.

(9) For each person employed in making the arrest of any person charged with a felony, not exceeding one dollar per day.

(10) For a guard in a case of felony, per day, \$1.00; for each mile traveled by the guard in going to jail and returning, eight cents. But no guard shall be paid in any case of misdemeanor, or employed or paid in a felony case, unless the justice order it and certify that such guard could not safely be dispensed with.

(11) For executing the first writ of *venire facias* at a term, five dollars, and one dollar and fifty cents for executing every other writ of *venire facias* at same term; provided where an officer goes out of his city or county to execute writ

of *venire facias*, he shall receive ten dollars for executing the writ, and his actual necessary expenses, to be set out in a sworn account to be approved by the court. Provided, however, that in no case shall there be more than one fee allowed for several offenses growing out of the same act or acts by any one party."

The board of supervisors of any county constituting a separate judicial circuit may supplement a constable's fees by a salary not over \$25 per month. (Acts 1920, p. 640.)

(3) *When fees of justice, constable, sheriff, or sergeant paid by State; how verified, certified, and paid.*—By section 3504 of the Code, as amended by Acts 1922: "Fees prescribed by law for services of Attorney for the Commonwealth, clerks of courts, and justices of the peace, and fees and mileage prescribed by law for sheriffs, deputy sheriffs, sergeants, deputy sergeants, constables, game wardens and all other law enforcement officers, whether regular or special, in all cases of felony, and in every prosecution for a misdemeanor, if not paid by the prosecutor, or in cases of conviction, by the defendant, and in cases where there is no prosecutor and the defendant shall be acquitted, or convicted and unable to pay the costs, shall be paid out of the State treasury, unless now or hereafter otherwise provided by law, when certified as prescribed by section 4961 of the Code, subject, however, to the following restrictions and limitations:

"One-half the fee prescribed by law to the officers heretofore mentioned except the Attorney for the Commonwealth and clerk of court, who shall have the full fee, provided, however, in no case shall said fee be paid out of the State treasury unless the judge of the court allowing the account certify to the Auditor of Public Accounts that he has actually examined the papers upon which the account is founded and is satisfied that warrant was issued, trial had, or examination made as shown in the account, and provided, further, that in no case, either felony or misdemeanor, except it be a case in which the defendant was acquitted and no prosecutor was liable for payment of the costs, shall the account be allowed or said fee paid unless the judge of the court allowing the account certify to the Auditor of Public Accounts that the execution re-

quired by section 4964 of the Code has been issued and proceeded with and return made thereon. In so far as this act relates to sheriffs, deputy sheriffs, sergeants, deputy sergeants, constables, game wardens and all other law enforcement officers, regular and special, not enumerated herein, it shall apply only to fees for making arrests, summoning witnesses and mileage." This act repeals section 3527.

By section 4961 of the Code, the justice certifies the expense of the proceeding before him to the court, and the court, if the account appears to be correct, certifies it to the Auditor; and the justice is required to file with his account a copy of the warrant in which the proceedings were had.

Fees for summoning witnesses for the accused are payable by him (Code, § 3490).

(4) *Allowance to witness for the Commonwealth; how certified and paid.*—By section 3512 of the Code: "All witnesses summoned for the Commonwealth shall be entitled to receive for each day's attendance 50 cents, [if he goes over 50 miles, \$1.00—see § 4957], all necessary ferriage and tolls, and 5 cents per mile over five miles going and returning to place of trial or before grand jury. All allowances to witnesses summoned on behalf of the Commonwealth shall be paid by the treasurer of the county or corporation in which the trial is had or in which the grand jury is summoned, and the amount so paid by such treasurer shall be refunded to him out of the State treasury, on a certificate of the clerk of the court in which the trial was had or before which the grand jury was summoned."

By Acts 1922, it is provided: "Not more than the maximum number of witnesses provided for herein shall be paid out of the State treasury in criminal cases:

The maximum number that may be recognized by any justice of the peace (or police) justice to go before the grand jury in any one case—three.

The maximum number that may be caused to be summoned by a Commonwealth's Attorney in any one case to go before a grand jury—five.

The maximum number that may be used before a justice of the peace or police justice in the trial of any criminal case—five.

The maximum number that may be caused to be summoned by a Commonwealth's attorney for the trial of any criminal case—ten.

Provided, that nothing herein shall be construed to limit the number of witnesses that may be authorized by any court or the judge thereof in vacation to be used when the necessity for additional witnesses is made to appear to the court or the judge thereof in vacation and the consent of the court or, the judge thereof in vacation is first obtained, or to limit the number of witnesses that a grand jury may of its own motion cause to be summoned."

On his oath, an entry of the sum a witness is entitled to and for what and by whom it is to be paid, is made by the justice before whom he attended, but no witness is allowed for his attendance in more than one case at the same time; and the justice may restrict the taxation of costs for witnesses to so many as may seem just. Such justice, upon the request of the witness, issues a certificate of allowance, wherein is expressed "by letters and not by figures, the separate amounts to which the witness is entitled for his attendance, traveling, and tolls and ferriage which he may have to pay, and the aggregate thereof;" and the justice is prohibited from becoming interested, by purchase, in such claim. Upon such certificate, payment is made. But the claim must be presented within two years. (Code, §§ 4957, 3529-32.)

(5) *Allowances to witness for accused; how certified and paid.*—A witness summoned and attending on behalf of the accused, shall be paid by him, even though discharged or acquitted (unless, indeed, judgment be rendered against the prosecutor in his favor) the following allowance:

For each day's attendance \$.50

If he comes over 50 miles 1.00

All necessary ferriages and tolls, and for each mile of necessary travel over 10 miles in going and returning04

Payment to such witness is made upon a like certificate as in case of a witness for the Commonwealth (Code, §§ 3490, 4957, 3529-32.)

By section 3513 of the Code as amended by Acts 1922, costs collected of a defendant or a prosecutor are to be paid

to the clerk, and by him paid into the treasury, except in misdemeanor cases the clerk, if the costs have not been allowed out of the State treasury, pays the amounts to the several parties entitled.

If the prosecutor pays the fees, they are paid to the officers, and need not be paid over to the clerk (Code, § 3504).

Where a justice or other officer receives a salary for general service, he receives no fees (Code, § 3511).

As to certifying fines and costs to clerks, and collection of same, see *Recovery of Fines before a Justice*, div. VII., above.

§ 2. Costs before a justice in Civil Cases.—

(1) *Fees of a justice.*—By section 3481 of the Code, as amended by Acts 1922, justices are allowed the following fees:

- “(1) For taking and certifying the acknowledgment of any deed or other writing\$.50
- (2) For administering and certifying an oath unless it be the affidavit of a witness, or acknowledgment of bail, or issuing process of attachment25
- (3) For taking and certifying affidavits or depositions of witnesses, where done in an hour 1.00
- (4) If not done in an hour, for any additional time at the rate per hour of75
- (5) For issuing any warrant in which the Commonwealth is not plaintiff, including the issuing of subpoenas .50
- Provided however, in cities between 100,000 and 175,000 inhabitants by the last U. S. census, the charge shall be 1.00
- (6) For trying and giving judgments on such warrants, including swearing witnesses, taxing costs and issuing executions 1.00
- (7) For each additional justice sitting in such a case 1.00
- (8) For other services, a justice of the peace shall have the same fees as the clerk of a circuit court for like services.
- (9) When a justice attends a trial and the case is continued to another day, the justice shall be entitled to a fee

of fifty cents, to be paid by the party asking for the continuance.

Under (8) above, a justice is allowed the following fees the same as a clerk (see Code, § 3484, as amended by Acts 1920, page 800):

For making out any bond (other than bail bond) and administering all necessary oaths, and writing proper affidavits\$.75

For issuing any summons or writ not particularly provided for—as, a warrant returnable before another justice; a warrant as to estray or drift property; a warrant as to a pauper or vagrant; a summons for witness to give deposition; an order requiring bail in a civil case, or the like25

Where a witness claims for his attendance, for administering an oath to him, and entering and certifying such attendance30

(2) *Fees of sheriff, sergeant, crier, coroner, or constable*,—By section 3487 of the Code, as amended by Acts 1922:

(1) The fees of sheriffs, sergeants, criers and constables shall be as follows:

(2) For serving on any person a declaration in ejectment or an order, notice, summons, or other process when the body is not taken and making return thereof..\$.50

(3) For summoning a witness or garnishee on an attachment50

(4) For serving on any person an attachment or other process under which the body is taken and making return thereof 1.00

(5) For serving a warrant under chapter 250 [Warrants for Small Claims]50

(6) For receiving a person in jail25

(7) For discharging a person from jail25

(8) For carrying a prisoner, other than a prisoner arrested for felony or misdemeanor, to or from jail, each mile of necessary travel, either in going or returning.... .05

(9) For removing a person, by virtue of a warrant issued under chapter 111 [as to the Poor] by a justice, or one of the overseers of the poor (to be charged to said

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overseers), for each mile of necessary travel, either going or returning	\$.50
(10) For taking any bond60
(11) When a petit juror is sworn in court, for impaneling and summoning such jury	1.50
(12) For serving any order of court, not otherwise provided for50
(13) When a jury is summoned upon a writ of <i>ad quod damnum</i> , or any inquest in vacation, for summoning them	1.00
(14) And for attending at the place of their meeting	1.00
(15) And if the jury attend there, and a verdict or inquisition be found and returned	2.00

But when more than one writ of *ad quod damnum* is executed by the same jury in the same case upon the same summons, the sheriff shall have but one fee for summoning the jury and attending at their place of meeting and shall be allowed but \$1.00 additional for such additional inquisition found and returned.

(16) For serving a writ of possession	\$1.50
(17) For keeping and supporting any person confined in jail, the same fees as provided in section 3510, or acts amendatory thereof [as to Jailer].	

For keeping and supporting any horse or mule distrained or levied on, for each day when stall fed.....	.80
(19) And for each day when pastured25
(20) For each hog or head of cattle, per day15
(21) For each sheep or goat, per day10
(22) For levying an execution or distress warrant or attachment	1.50

Provided, however, that in cities having a population of more than 25,000 inhabitants by the last preceding U. S. census or other enumeration authorized by law, the fee shall not exceed the sum of 50 cents.

The circuit court of any county or the corporation court of a corporation may, at any time, fix or alter the rates to be henceforth paid in such county or corporation for keeping and supporting any person in jail or any

horse or live stock, but the rates so fixed or altered shall never exceed those hereinbefore mentioned. The officer shall be paid any necessary expense incurred by him in keeping property not before mentioned or in removing any property; and when, after distraining or levying on tangible property he neither sells nor receives payment and either takes no forthcoming bond, or takes one which is not forfeited, he shall, if in default, have (in addition to the sixty cents for a bond, if one was taken) a fee of \$3.00

Unless this is more than one-half of what his commission would have amounted to if he had received payment, in which case he shall (whether a bond was taken or not), have a fee of at least \$1.00, and so much more as is necessary to make the said half.

The commission to be included in a forthcoming bond, when one is taken, shall be ten per centum on the first \$100 of the money for which the distress or levy is; five per centum on the next \$100, and two per centum of the residue of said money; but such commission shall not be received unless the bond is forfeited or paid (including the commission) to the plaintiffs, and of whatever interest may accrue on such bond, or the execution of judgment thereon, the officer shall be entitled to his proportionable share thereof, on account of his fees included in said bond. An officer receiving payment under an execution or other process in money, or selling goods, shall receive the like commission of ten per centum on the first \$100 of the money paid of proceeds from the sale, five per centum on the next \$400, and two per centum on the residue; except that when such payment or sale is on execution on a forthcoming bond, his commission shall only be half what it would be if the execution were not on such bond.

In cities of sixty thousand inhabitants and more, however, the commission to be included in a forthcoming bond, when one is taken, shall be ten per centum on the first \$100 of the money for which the distress or levy is, and two per centum on the residue of said money; but such commission shall not be received unless the bond is forfeited or paid (including the commission) to the plaintiffs, and of whatever interest may accrue on such bond, or the execution of judg-

ment thereon, the officer shall be entitled to his proportionable share thereof, on account of his fees included in said bond. An officer receiving payment in money or selling goods shall receive the like commission of ten per centum on the first \$100 of the money paid or proceeding from the sale, and two per centum on the residue, except that when such payment or sale is on an execution on a forthcoming bond, his commission shall only be half what it would be if the execution were not on such bond."

And by section 3488, as amended by Acts 1920, page 841: "Whenever on any decree or judgment in a civil case any *feri facias* issued by the clerk of any court or justice of the peace is placed in the hands of any officer and no levy is made or forthcoming bond is taken thereon, and a return is made by said officer, the said officer so making a return thereon shall be allowed a fee of fifty cents for making said return. In any case where such officer makes a levy and by reason of a settlement between the parties to the claim or suit, the officer is not permitted to sell under such levy, he shall nevertheless be entitled to recover from the party, for whom the services were performed, one-half the commissions for such levy."

An officer is not required to execute an order, notice, summons, or other civil process (except an execution) sent him from another county, unless the fee and postage is sent him (Code, § 2827).

Where an officer after due effort, fails to execute process, etc., in a pending case, he is nevertheless entitled to his fee, to be taxed in the costs; but if not in a pending proceeding in court, the party securing his service is to pay his fee, upon affidavit of diligent effort to execute the paper (Code, § 3489).

(3) *To whom fees chargeable; how collected.*—By section 3490, the fees of officers are chargeable "to the party at whose instance the service is performed," except the fees for entering and certifying the attendance of witnesses, and the proceedings to compel payment for such attendance, shall be charged to the party for whom the witness attended.

A fee bill of an officer duly made out—i. e., expressing the particulars for which the fees are charged, and signed by the officer—may (after presentation and failure to pay) be

delivered to the sheriff, sergeant, treasurer, or constable, who is required to receive and to endeavor to collect the same, and for this purpose he may distrain therefor (and the sheriff, also, for his fee bills), such property as an execution may be levied on, and garnishment proceedings may be had as in the case of taxes. For collection, the officer receives 10 per cent. commission. Fee bills may be collected by distress, warrant, or suit, within 5 years. (See Code, §§ 3495-3500.)

(4) *Allowance to witnesses; how certified and paid.*—By section 3529 of the Code: "A person attending as a witness under a summons shall have fifty cents for each day's attendance and 4 cents per mile for each mile beyond ten miles necessarily traveled to the place of attendance and the same for returning, besides the tolls at the bridges and ferries which he crosses, or turnpike gates he may pass."

The allowance to a witness is to be paid by the "party for whom he was summoned," upon a like certificate as in a criminal case—see section 1, (5), above.

The justice may restrict taxation of costs for witnesses to so many as may be deemed just; and he may determine any dispute (before or after issuing the certificate) between a witness and a party, as to the justice or amount of the claim (Code, §§ 3529-30, 3532).

§ 3. Various forms under "Costs before a Justice."—

No. 1. JUSTICE'S VERIFIED ACCOUNT AGAINST THE COMMONWEALTH.

(Code, §§ 3504, 3507, (as amended by Acts 1920, p. 804), 4961.)

Commonwealth of Virginia,

In account with J. T., a justice for _____ county, Dr.

Jan.—192—	To issuing warrant for arrest of C. D., for misdemeanor	\$1.00
Feb.—"	To issuing warrant for arrest of C. R., for felony ..	1.00
" "	To trying a case of misdemeanor against M. R. ..	2.00
" "	To examining charge of felony against D. R.	2.00
	[Continue thus as to other costs]	_____

Total..... \$.....

I do solemnly swear (or *affirm*) that the above or (*foregoing* or *within*) account is correct: so help me God.

J. T., J. P.

Sworn to before me, C. C., clerk of the circuit court for _____ county, this _____ day of _____, 192—.

C. C. Clerk.

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No. 2. CONSTABLE'S, SHERIFF'S, OR SERGEANT'S VERIFIED ACCOUNT
AGAINST THE COMMONWEALTH

(*Idem.*)

Commonwealth of Virginia.

In account with R. R., constable (or <i>sheriff</i> or <i>sergeant</i>) for ——— county (or <i>corporation</i>),		Dr.
Oct. 25, 192—To arresting C. D., for misdemeanor		\$1.00
“ — “ To summoning A. B., B. C., and C. E., against C. D., charged with misdemeanor		1.50
Nov. — “ To employing O. P. 2 days to assist in arresting C. R. for felony		2.00
“ — “ To arresting C. R., for felony		1.50
“ — “ To summoning A. B., B. C., and D. E. against C. R., charged with felony		1.20
“ — “ To amount paid for 1 day's board of C. R., while under arrest and pending examination for felony against him		—
“ — “ To employing, on order of justice, O. R. to guard C. R. 1 day		1.00
“ — “ To carrying C. R. 20 miles to jail,		1.60
“ — “ To mileage of guard O. R., in carrying C. R. 20 Miles to jail		3.20
Total		\$

I do solemnly swear (or *affirm*) that the above (or *foregoing* or
within) account is correct: so help me God.

R. S., Constable (or *sheriff* or *sergeant*).

O. P.

O. R.

Sworn to by R. S., O. P., and O. R., before me, J. T., a justice for
——— county, this ——— day of ———, 192—.

J. T., J. P.

The circuit judge may certify the allowance of the account as
follows:

County (or *corporation*) of ———, to-wit:

I certify that I have actually examined the papers on which the
within account is founded, and am satisfied that the warrant was
issued and that the trial (or *examination*) was had (or *made*), and the
said account is correct, and one-half of the fees charged is payable out
of the State treasury. Given under my hand, this ——— day of ———,
192—.

C. J., Circuit Judge for ——— County.

In case a guard is ordered and employed, have the justice to en-
dorse on the account this certificate: “I, J. T., a justice for ———
county, do hereby certify that on ——— day of ———, 192—, I

ordered a guard for C. R., then in custody for a felony, and that the same could not be safely dispensed with. Given under my hand, this _____ day of _____, 192—. J. T., J. P.

NO. 3. CERTIFICATE OF ALLOWANCE TO A WITNESS.

(Code, §§ 3512, 4957.)

_____ county, to-wit:

I, J. T., a justice of said county, do hereby certify that A. B., on _____ day of _____, 192—, attended before me, at _____, in said county, under summons as a witness for the Commonwealth (or *for O. D.*), in a prosecution against C. D., charged with a misdemeanor (or *felony*); for which he is entitled to the sum of fifty cents for one day's attendance, the sum of _____ cents for traveling _____ miles over ten in going to and returning from _____, the sum of _____ cents for ferriage, and the sum of _____ cents for tolls, amounting in the aggregate to _____ dollars and cents, payable by the Commonwealth of Virginia, out of the public treasury (or *payable by the said O. D.*).

Given under my hand, this _____ day of _____, 192—.

The justice will take care to state the amount *in writing*, and *not by figures*.

NO. 4. JUSTICE'S MONTHLY REPORT OF FINES AND COSTS.

(Code, §§ 2550, 4963, 4965.)

To the Clerk of Circuit Court of _____ county:

Report of criminal cases disposed of by J. T., a justice for _____ county, for the period commencing on _____ day of _____, 192—, the date of my last report, and ending on _____ day of _____, 192—:

Commonwealth
against
John Smith, } Felony

Committed (or *bailed or discharged*) _____ day of _____, 192—.

Costs of Commonwealth, \$____, as follows:

X. Y., constable, for arresting defendant	\$1.50
X. Y., constable, for summoning A. B. and B. C., witnesses for the Commonwealth80
A. B. and B. C., witnesses for the Commonwealth, _____ days (and mileage and ferriage, if any)	
J. T., J. P., for issuing warrant of arrest and examining the charge of felony	3.00

Commonwealth
against
Henry Hunter, } Misdemeanor

Convicted _____ day of _____, 192—; imprisonment _____ days; fine \$____; amount paid \$____.

Costs of Commonwealth, \$——, as follows:	
X. Y., constable, for arresting defendant	\$1.00
X. Y., constable, for summoning A. B., witness for the Commonwealth50
A. B., witness for the Commonwealth, —— days	
J. T., J. P., for issuing warrant of arrest and trying the case ..	3.00
Commonwealth	
against	
Peter Fowler,	
}	Misdemeanor
Acquitted —— day of ——, 192—.	
Costs of Commonwealth, \$——, as follows:	
X. Y., constable, for arresting defendant	\$1.00
X. Y., constable, for summoning A. B., witness for the Commonwealth50
A. B., witness for the Commonwealth, —— days	
J. T., J. P. for issuing warrant of arrest and trying the case	3.00
[If judgment against prosecutor for costs, so state.]	
Certified under my hand, this —— day of ——, 192—.	
J. T., J. P.	

JUSTICES IN CITIES AND TOWNS

See Justice of the Peace

- § 1. Kinds of justices
 - I. MAYOR OF TOWN AS JUSTICE OF THE PEACE
- § 2. Jurisdiction of mayor
 - II. JUSTICES OF THE PEACE IN CITIES
- § 3. Jurisdiction
 - III. CIVIL AND POLICE JUSTICE
- § 4. Election, qualifications, oath, bond, compensation, disability, etc.
- § 5. Criminal jurisdiction
- § 6. Civil jurisdiction
- § 7. Issue of warrants
- § 8. Costs in civil cases to be prepaid
- § 9. Procedure in civil cases
- § 10. Appeals and removals, in criminal or civil cases
- § 11. Dismissal of claims
- § 12. Rules of practice
- § 13. Courtroom, books, stationery, bailiff
- § 14. Provisions in charters repealed
 - IV. POLICE JUSTICE
- § 15. Appointment and jurisdiction

- § 16. Salary; substitute in case of disability, etc.
V. CIVIL JUSTICE
- § 17. Election; salary; jurisdiction
VI. COSTS BEFORE A JUSTICE
- § 18. Costs before a justice—See *Justice of the Peace*, Div. X.

§ 1. **Kinds of justices.**—In cities of different sizes, there are four sorts of justices, viz., justices of the peace in all cities; civil and police justices in cities from 10,000 to 45,000 inhabitants; and a police justice and a civil justice in cities of over 45,000 inhabitants. In incorporated towns having less than 5,000 population, there are the justices of the peace of the magisterial district embracing the town (see title *Justice of the Peace*), and also the mayor, who is a justice of the peace by virtue of his office, exercising all the authority and powers of a justice.

I. MAYOR OF TOWN AS JUSTICE OF THE PEACE

§ 2. **Jurisdiction of mayor.**—By section 3011 of the Code: "The mayors of towns shall be clothed with all the powers and authority of a justice in civil and criminal matters within the county where such town is situated, and shall also have power to try all prosecutions, cases and controversies which may arise under the by-laws and ordinances of the town, and to inflict such punishment as are provided by law, with the right of appeal to the circuit court in all cases, except that no appeal shall be granted from the decision of the mayor imposing a fine for violation of any of the ordinances or by-laws of said town for offenses not made criminal by the common law or statutes of Virginia until after bond with security approved by said mayor shall be given by the person so fined, or some one for him with condition to pay all such fines, costs and damages as may be awarded by the said court on appeal. The penalty of said bond shall be double the amount of the judgment appealed from. In the event that said decision of said mayor should be affirmed by the court, in whole or in part, the judgment shall be entered against the principal and surety for the amount so rendered, with costs of the first trial and also costs of the appeal, and execution shall issue thereon in the name of the said town against both

principal and surety. The president of the council, in any case for violating the ordinances or by-laws of said town, where the mayor is absent or for any reason cannot sit, shall have all the powers hereinbefore conferred by this section upon the mayor."

In criminal matters, the mayor has jurisdiction for one mile beyond the corporate limits (Code, § 3006).

II. JUSTICES OF THE PEACE IN CITIES

§ 3. Jurisdiction.—In every city, whose charter does not provide for the election of justices of the peace, one justice of the peace is elected in each ward (more, if the court thinks proper), for four years. They are conservators of the peace within the city and for one mile beyond; and within this limit they possess the jurisdiction and powers of justices of the peace in the counties except their jurisdiction is limited by that given to police justices and to civil and police justices. (Code, §§ 3092, 129.)

It should also be observed that the acceptance or holding by a justice of the office of clerk of a court, sheriff, sergeant, coroner, or constable, or deputy of either, vacates the office of justice (Code, § 3093).

III. CIVIL AND POLICE JUSTICE

§ 4. Election, qualifications, oath, bond, compensation, disability, etc.—In each city from 10,000 to 45,000 inhabitants there are elected "a special justice of the peace to be known as the civil and police justice," for four years. He must have practiced law in this State for five years, and must reside in the city, and not hold any other office of public trust. He must also take the official oath and give bond. His salary is paid monthly by the city. His court shall be open every day except Sundays, and legal holidays, except a month's vacation. In case of disability, etc., a substitute (preferably a lawyer) is appointed. (Code, §§ 3097-3101, and Acts 1922, amending § 3101.)

§ 5. Criminal jurisdiction.—He is a conservator of the peace within the city and for one mile beyond. Within such limits, he has exclusive original jurisdiction for the trial of

all offenses against the city ordinances, and of all misdemeanors against the State law, except revenue and election laws, and liquor cases, offenses against public policy (chap. 185), and the transportation, etc., of freight on Sunday by railroads (§§ 4572-4), or where it is otherwise expressly provided. He has concurrent jurisdiction with the corporation court in revenue and election laws cases, except liquor cases (chap. 184), and of all offenses against public policy (chap. 185), and the transportation, etc., of freight on Sunday by railroads (§§ 4572-4). He has no jurisdiction, original or concurrent in liquor cases, unless conferred by that chapter (184). (Code, § 3102, as amended by Acts 1922.)

In misdemeanor cases the defendant may be sent to the city farm (see Acts 1922, p.—), or the chain gang (see *Cities and Towns*, § 49).

§ 6. Civil jurisdiction.—He has exclusive jurisdiction in all civil matters cognizable by justices of the peace for the counties (see *Justice of the Peace*), “and shall in addition thereto have concurrent jurisdiction with the circuit and city courts of general jurisdiction of any claim to damages for any injury done to the person, which would be recoverable by action at law, if such claims do not exceed three hundred dollars. No other justice of the peace in such city shall hereafter exercise such jurisdiction as is herein conferred on said civil and police justice, except as provided in this chapter.

“The said civil and police justice shall also have jurisdiction to try and decide attachment cases where the amount of the plaintiff’s claim does not exceed the general jurisdiction of said civil and police justice, and the proceedings on any such attachment shall conform to the provisions of chapter 269 of the Code of 1919; save when an attachment other than under section 6416 is returned executed, and the defendant has not been served with a copy thereof, the said civil and police justice, upon affidavit in conformity with section 6269 of the Code of 1919, shall forthwith cause to be posted at the front door of his court room a copy of the said attachment, and shall file a certificate of the fact with the papers in the case, and in addition to the said posting, the plaintiff, in the said attachment, or his attorney, shall give to the clerk of the said civil

and police justice the last known address or abode of the said defendant, verified by affidavit, and the said clerk shall forthwith mail a copy of the said attachment to the said defendant, at his, or her, last known address, or place of abode; or, if said defendant be a corporation, at its last known address, and the mailing of the said copy as aforesaid shall be certified by the said clerk in writing, and such certificate shall be filed with the papers in the case, and after the said copy of the attachment has been so posted and mailed, as aforesaid, for 15 days, the said civil and police justice may proceed to try and decide the said attachment"—see "*Attachments*," div. (I), under *Justice of the Peace*. (Code, § 3102, as amended by Acts 1922.)

§ 7. Issue of warrants.—The warrant, civil or criminal, is issued by a justice of the peace of the city and is returnable before the civil and police justice for trial (Code, § 3103).

§ 8. Costs in civil cases to be prepaid; the hearing.—The costs must be paid to the trial justice at or before the hearing. It is estimated as 50 cents for each \$100 of value, or fraction thereof, claimed in the warrant, which is taxed as part of the cost. The trail fees are to be paid monthly into the city treasury. (Code, § 3104.)

§ 9. Procedure in civil cases.—They are the same as in case of "Warrants for Small Claims"—see under *Justice of the Peace*, div. I; "except that warrants for small claims may also be made returnable before such civil and police justice, if the defendant, or one of them, if there be more than one defendant, is regularly employed or has his regular place of business in such city or if the cause of action arose therein"; and except also either party may require a statement of the particulars of the claim or the grounds of defense, as in section 6091 of the Code, and a guardian *ad litem* (for the litigation) for a person under 21 years or an insane defendant may be appointed, and the trial proceed. He issues an execution immediately, if no new trial be granted, nor appeal or stay or execution allowed, which he may renew either before or after one year from the date of the judgment. (Code, § 3105.)

§ 10. Appeals and renewals, in criminal or civil cases.—The appeal, in misdemeanor cases, is to the corporation court

as in case of "Warrants for Small Claims"—see *Justice of the Peace*, div. I. In civil cases no removal to any other court is allowed, but an appeal to court is allowed in cases over \$20, exclusive interest, upon proper bond being given, and the bond is also to pay the judgment of the justice as under section 6028, if the appeal is not perfected; and upon payment of the writ tax, the clerk docket the case, which is then tried and judgment rendered as in section 6038, in case of "Warrants for Small Claims." But if the writ tax is not paid within 30 days from the date of the judgment, the appeal is dismissed and the papers returned to the justice. (Code, § 3106.)

§ 11. **Dismissal of claims.**—In civil cases, if the case has been pending before the justice 60 days, he notifies the parties the same will be dismissed in 10 days unless good cause be shown to the contrary. The plaintiff, at or before the hearing, must pay the justice for filing and indexing the papers 25 cents, which is taxed as part of the costs, and paid into the city treasurer. (Code, § 3107, as amended by Acts 1920, p. 560.)

§ 12. **Rules of practice.**—The civil and police justice has "power to make and enforce such reasonable rules of practice as are not in conflict with law." (Code, § 3108.)

§ 13. **Courtroom, books, stationery, bailiff.**—See Code, §§ 3109-10.

§ 14. **Provisions in charters repealed.**—By section 3111 of the Code: "All charter provisions in conflict with this chapter [124, as to "Civil and Police Justices and Civil Justices"] are repealed."

IV. POLICE JUSTICE

§ 15. **Appointment and jurisdiction.**—In a city of over 45,000 inhabitants, if the charter has not provided for him, the council appoints a police justice for four years. His jurisdiction is criminal, the same as that of the civil and police justice—see div. III., section 2, above, except he would seem to have exclusive jurisdiction of misdemeanors against the election laws, and also of liquor cases but for the fact the liquor law deals fully with the jurisdiction of courts and justices in cases arising thereunder. (Code, § 3094.)

§ 16. **Salary; substitute in case of disability, etc.**—See Code, §§ 3095-6.

V. CIVIL JUSTICE

§ 17. **Election; salary; jurisdiction.**—In cities of 45,000 or more inhabitants, the General Assembly elects for six years a special justice of the peace known as "civil justice", his qualifications and residence being the same as in the case of a civil and police justice, and his salary not less than \$3,000 payable by the city. His jurisdiction is the same as that of a civil and police justice, except he has no jurisdiction of criminal cases or of violations of town ordinances. In fact all the provisions of the chapter as to a civil and police justice applicable to the civil justice, except as herein otherwise provided. (Code, §§ 3112-15.)

For proceedings upon interrogatories before a civil justice, contempt cases, clerk, costs, and how process directed and executed, see Code, §§ 3116-20; Acts 1920, p. 269, amending § 3118.

VI. COSTS BEFORE A JUSTICE

§ 18. **Costs before a justice.**—See *Justice of the Peace*, div. X.

JUVENILE AND DOMESTIC RELATIONS COURTS

See *Minors, etc.*, section 30; *Probation Officers; State and Other Boards of Public Welfare*

I. IN CITIES OVER 25,000.

- § 1. Establishment
- § 2. Salary
- § 3. When and where courts held; substitute judge
- § 4. How judge removed
- § 5. Judge, conservator of peace; his jurisdiction
- § 6. Contempt of court
- § 7. Court-room, office, etc.; records under judge's control
- § 8. Commonwealth's attorney to aid court; sheriff, police officer, or others designated, to serve papers
- § 9. Traveling expenses of officers, witnesses, and others
- § 10. Co-operation of societies, organizations and institutions, public or private, sought
- § 11. Bonds valid though principal a minor

- § 12. Appeals; new trial
- § 13. Clerk to take affidavit, administer oaths, and issue all necessary orders or writs

II. IN COUNTIES, AND CITIES UNDER 25,000

- § 14. Establishment; joint courts embracing larger cities over 25,000
- § 15. Fees or salary of judge
- § 16. When and where courts held; substitute judge
- § 17. Judge, conservator of peace; his jurisdiction
- § 18. Contempt of court
- § 19. Office, etc.; records under control of justice
- § 20. Commonwealth's attorney and clerk to aid court; sheriff, constable, police officer, or other designated person, to serve papers
- § 21. Traveling expenses of officers, witnesses, and others
- § 22. Appeals; rehearing

I. IN CITIES OVER 25,000

§ 1. **Establishment.**—The council or other governing body of a city of 25,000 or more elects a licensed attorney a special justice of the peace, to be judge of such court, and to hold office for 6 years; but in cities of 25,000 to 100,000, the civil or police justice may be designated to act as such judge. (Code, § 1945, as amended by Acts 1922.) The terms of office of all new judges commence January 1st after their election, or on the 1st of such month as the council or other governing body may designate (Code, § 1953, as amended by Acts 1922.) He must take the oath of office prescribed by law. (Code, § 1946, as amended by Acts 1922.)

§ 2. **Salary.**—The council or other governing body fixes the salary, which is in lieu of fees, which are paid into the city treasury on or before the 10th of each month. (Code, §§ 1946-7, as amended by Acts 1922.)

§ 3. **When and where courts held; substitute judge.**—The judge holds court, as may be provided by city ordinance or at such times and places in his territorial jurisdiction as he may designate, with a vacation of at least 30 days each year.

Upon the judge's recommendation, the corporation or hustings court judge, appoints a discreet and competent person as a substitute justice, and may at any time revoke such appointment, and make a new appointment, in such case, or in

case of his resignation, death, absence or disability. In case of disability of the judge from sickness, absence or otherwise, or the impropriety of his acting, the substitute justice acts in his stead; and in case of the judge's resignation, death, removal, or permanent disability, the substitute justice acts until his successor is elected and qualified. The substitute justice's salary is as the city may determine. (Code, § 1948, as amended by Acts 1922.)

§ 4. How judge removed.—He may be removed by the corporation court like other officers, under section 2705 of the Code. (Code, § 1949, as amended by Acts 1922.)

§ 5. Judge, conservator of peace; his jurisdiction.—He is a conservator of the peace within the city and for one mile beyond; and has, within the city, original, exclusive jurisdiction, and for one mile beyond, concurrent jurisdiction, with the justices and the circuit courts of the counties, over all cases, matters, and proceedings involving: [The jurisdiction is conferred in identical language with the jurisdiction of courts in counties and cities under 25,000—supply here section 17, below, from (1) to end of that section.] (Code, § 1950, as amended by Acts 1922.)

§ 6. Contempt of court.—Same as in section 18, below. (Code, § 1950a, added by Acts 1922.)

§ 7. Court-room, office, etc.; records under judge's control.—The city must provide a suitable court-room and offices for said court, all necessary furniture, filing cabinets, dockets, books, stationery, etc.

Upon consultation with the State Commissioner of Public Welfare, the judge determines the form and character of his records; determine and publish the rules regulating the proceedings in all cases not otherwise provided for by law, and for the conduct of all probation and other officers of the court; and such rules shall be enforced and construed liberally. The records are under the control of the judge, and are not to be removed or examined without his consent, except by persons authorized by law to make such examinations.

The judge, after consultation with the said commissioner, may also devise, promulgate and cause to be printed for the use of the public and the court, forms necessary and conven-

ient for use under this chapter. (Code, § 1951, as amended by Acts 1922.)

§ 8. Commonwealth's attorney or clerk to aid court; sheriff, constable, police officer, or designated person, to serve papers.—The court may call upon the Commonwealth's attorney or clerk to assist in any proceeding and the latter also represents the State in all cases appealed. The sheriff and police officers must serve all papers directed to them, but any paper or process issued by the court may be served by any person designated for the purpose. (Code, § 1951a, added by Acts 1922.)

§ 9. Traveling expenses of officers, witnesses, and others.—These are paid by the State Auditor out of the criminal accounts fund, upon an account approved by the judge. (Code, § 1951b, added by Acts 1922.)

§ 10. Co-operation of societies, organizations and institutions, public or private, sought.—They, are also required to give information to the court as to any children in their custody. (Code, § 1951c, added by Acts 1922.)

§ 11. Bonds valid though principal a minor; procedure in case of forfeiture.—See Code, § 1951d, added by Acts 1920.

§ 12. Appeals; new trial.—An appeal may be taken in the manner prescribed by section 1920 of the Code of Virginia as amended by acts 1922 (see *Minors, etc.*, section 30, (15)). If the party be over 18, the appeal may be taken by him to the corporation court, within 10 days. But in either case the appeal may be withdrawn any time before the appeal papers are actually filed. Also a new trial may be granted in any case within 30 days, upon good cause shown, after due notice to interested parties. The appellate court certifies its decision to the trial court, and if the child or adult person is not discharged, he may be remanded to the trial court. (Code, § 1951e, added by Acts 1922.)

§ 13. Clerk to take affidavits, administer oaths, and issue all necessary orders or writs.—See Code, § 1951f, added by Acts 1922.)

II. IN COUNTIES, AND CITIES UNDER 25,000

§ 14. Establishment; joint courts embracing larger cities.—"The circuit court of every city of less than 25,000 inhabitants or the corporation court thereof if there be no

circuit court and the circuit court of every county of this State shall appoint a special justice of the peace, preferably a person trained in the law, to be known as the judge of the juvenile and domestic relations court for such city or county, who shall hold office for a term of six years and until his successor has been appointed and has qualified, unless sooner removed as provided by section 2705 of the Code of Virginia of 1919 (see "*Ouster law*"); provided, that said circuit court may designate or appoint the same person to act as such special justice for a city and one or more counties, or for two or more counties, within his judicial circuit. Cities having no corporation court or separate circuit court shall, for the purposes of this act, be deemed in all respects to be parts of the counties in which they are situated. Police and civil justices shall be eligible to appointment under the provisions of this act." (Acts 1922, p.—, § 1.) He must take oath of office prescribed by law. (Id., § 2.) The judge's term of office commences on January 1st after his appointment or on the date specified by the court appointing him. (Id., § 11.)

"In the event that the council or other governing body of any city of 25,000 inhabitants or more, or the board of supervisors of an adjoining county shall, by ordinance, resolution, or by-law, signify their desire to unite in the establishment of a juvenile and domestic relations court with jurisdiction over said city and said county or any district or districts thereof, the circuit court of such county shall thereupon appoint a special justice of said county or specified district or districts thereof, a person nominated by the council or other governing body of said city, who shall thereupon exercise jurisdiction under the provisions of this act within the boundaries of said city and said county or the specified district or districts thereof.

"In the event that any city and county or counties, or part thereof, or any two or more counties shall unite in the establishment of a juvenile and domestic relations court, as provided by law, the expense of operation and maintenance of such court and of caring for the wards of such court shall be jointly borne in proportion to their respective populations or as may be agreed upon by the constituted authorities of the respective cities and counties." (Id., §§ 12, 13.)

§ 15. Fees or salary of judge.—"Every special justice appointed under this act shall receive the fees prescribed by law for justices of the peace, or in lieu thereof he shall receive out of the treasury of the city or county for which he is appointed such salary as the council or other governing body of the city or the board of supervisors of such county may prescribe, in which latter event all such fees, when collected, shall be accounted for and paid by him into the treasury of said city or county, as the case may be, on or before the tenth day of each month." (Id., § 3.)

§ 16. When and where courts held; substitute judge.—"Such special justice shall hold court at such time and in such places within his territorial jurisdiction as he shall from time to time designate; but he may be allowed such vacation period as the court appointing him may approve.

Said appointing court, or the judge thereof in vacation may, by proper order of record, appoint as a substitute justice of said juvenile and domestic relations court, a discreet and competent person, and may at any time revoke such appointment, and make a new appointment in like manner in the event of such revocation, or of the resignation, death, absence or disability of such substitute justice. In the event of the inability of said special justice to perform the duties of his office by reason of sickness, absence, or otherwise, or the impropriety of his acting, such substitute justice shall perform the duties and possess the powers of said special justice during such period, and in the event of the resignation, death, removal, or permanent disability of the special justice, such substitute justice shall act until a successor has been appointed and has qualified." (Id., § 4.)

§ 17. Judge, conservator of peace; his jurisdiction.—"The special justices appointed under the provisions of this act shall be conservators of the peace within the corporate limits of the cities or boundaries of the counties for which they are respectively appointed and in the case of cities within one mile beyond the corporate limits of such cities; and, except as hereinafter limited, the special justices of said cities shall have, within the corporate limits of their said cities, exclusive original jurisdiction, and, within the territory within one mile

beyond said corporate limits, concurrent jurisdiction with the special justices of the adjoining county or counties; and the special justices of said counties shall have within the boundaries of their respective counties exclusive original jurisdiction, except as to that territory in which the special justices of cities have concurrent jurisdiction—over all cases, matters and proceedings involving:

(1) The disposition, custody or control of delinquent, dependent, and neglected children;

(2) The enforcement of any law, regulation or ordinance for the education, protection or care of children;

(3) The prosecution and punishment of persons charged with ill-treatment, abuse, abandonment or neglect of children, or with contributing to their delinquency or dependency or neglect in any manner, or with any other offenses against children under the age of eighteen years except murder and manslaughter; provided, however, that in prosecutions for felonies other than murder, manslaughter and rape, the jurisdiction of said special justice shall be limited to that of an examining magistrate;

(4) All offenses, except murder, manslaughter and rape, committed by one member of a family against another member of said family, and the trial of all criminal warrants in which one member of a family is complainant against another member of said family; provided, however, that in prosecutions for felonies other than murder, manslaughter, and rape, the jurisdiction of said special justice shall be limited to that of an examining magistrate. The word "family" as used herein shall be construed to include husband and wife, parent and child, brother and sister, grandparent and grandchild;

(5) The prosecution and punishment of persons, male or female, who knowingly contribute in any way to the disruption of marital relations or of a home.

Said special justice shall, in all such cases, possess the jurisdiction and exercise all the powers conferred upon justices of the peace and police justices by the laws of this State, and he shall have such other powers and jurisdictions as may be lawfully conferred upon him. He shall have the same powers with respect to the amendment or issuance of warrants as are

conferred on courts and judges by the provisions of section 4989 of the Code of Virginia (see div. VI., section 6, above).

This act shall be construed liberally and as remedial in character; and the powers hereby conferred are intended to be general to effect the beneficial purposes herein set forth. It is the intention of this act that in all proceedings concerning the disposition, custody or control of children coming within the provisions hereof, the court shall proceed upon the theory that the welfare of the child is the paramount concern of the State; and to the end that this humane purpose may be attained, said justices shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature.

From the hearing or trial of all cases, matters or proceedings under the provisions of this chapter, there shall be excluded all persons, except officers of the court, attorneys and witnesses in the case, and the accused, his relatives or his guardian or custodian. Any hearing or trial may be had in chambers." (Id., § 5.)

§ 18. Contempt of court.—"The said special justices shall have the same powers in matters of contempt as are conferred on courts and judges by the general law, but in no case shall the fine exceed \$50 and imprisonment exceed 10 days for the same contempt. From any such fine or sentence an appeal shall be allowed as appeals are allowed from such justices in other cases affecting adults, and the proceedings in such appeals shall conform in all other respects to the provisions of section 4523 of the Code of Virginia (see *Contempts*)." (Id., § 6.)

§ 19. Office, etc.; records under control of justice.—"The council or other governing body of each city and the board of supervisors of each county may provide suitable office space for said special justice, and may furnish necessary furniture, filing cabinets, dockets, books, stationery, et cetera.

Said special justices shall use such forms and books of record as may be prescribed, or provided by the State Board of Public Welfare. The records of such court shall be under the control of said special justice, and shall not be removed or examined by any person without his consent, except by

persons authorized by law to make such examinations." (Id., § 7.)

§ 20. **Commonwealth attorney and clerk to aid court; sheriff, constable, police officer, or other designated person to serve papers.**—"The special justice may, in his discretion, call upon the Commonwealth's attorney or the clerk of the circuit court of his city or county to assist him in any proceeding under this act, and it shall be the duty of such Commonwealth's attorney and clerk to render such assistance when so requested, and said Commonwealth's attorney shall represent the State in all cases appealed from said juvenile and domestic relations court to other courts; and the sheriffs and the constables of the counties of this State and the police officers and sergeants of the cities shall serve all papers directed by said special justice to be served by them; but any paper, summons or process issued by said special justice may be served by any person designated by said special justice for that purpose."

§ 21. **Traveling expenses of officers, witnesses, and others.**—"The traveling expenses of such special justice incurred in the discharge of his duties and the traveling expenses incurred by a probation officer of said city or county, when traveling under the order of said special justice, shall, after being approved by the judge of the circuit court of such city or county, be paid by State Auditor of Public Accounts out of the fund provided for such purpose."

§ 22. **Appeals; rehearing.**—An appeal is taken or new trial had as in case of section 12, above.

LABELS OR PRINTS

See Copyrights; Patents; Trade-Marks

- § 1. Act providing for their registry
- § 2. Meaning of "print" or "label"
- § 3. How labels registered

§ 1. **Act providing for their registry.**—By an old act

of Congress (§ 3 of the Copyright Act of 1874), still in force, prints or labels designed to be used for any article of manufacture (other than pictorial illustrations or works connected with the fine arts) cannot be copyrighted, but may be registered in the patent office under the regulations provided for the copyright of prints. The registry continues in force for 28 years. The benefits of this act is by treaties also extended to British, German, Italian, and Belgian subjects.

§ 2. Meaning of "print" or "label."—"Prints" and "labels" are construed as meaning the same, and are any device, picture, word or words, figure or figures (not a trade mark), printed, impressed, or stamped directly upon the articles of manufacture, or upon a slip or piece of paper or other material, to be attached in any manner to manufactured articles, or to bottles, boxes, or packages, containing them, to indicate the contents of packages, the name of the manufacturer, or the place of manufacture, the quality of the goods, directions for use, etc. Only such devices, etc., are "labels"; and only such labels are within the act; other labels may be trade-marks—see *Trade-Marks*.

§ 3. How labels registered.—Application is made to the Commissioner of Patents, Washington, D. C., on a form which he will furnish upon application, and must be accompanied by 10 copies of the print or label and the registry fee of \$6, which covers the cost of a certificate of the registry. The application for registry must be made before the print or label is actually used; but no examination of its novelty is made by the department.

LABOR

See *Liens of Mechanics and Others* and *Homestead and Other Exemptions*

§ 1. Bureau of Labor and Industrial Statistics.—See Code, §§ 1797-1806, and Acts 1922, amending §§ 1799, 1802.

§ 2. Protection of employees.—See Code, §§ 1807-34, and Acts 1918, pp. 363, 756, amending § 1808; pp. 347, 756—§.1809; p. 347—§§ 1811-16; p. 620—§§ 1818-20; p. 440—§ 1921;

and Acts 1920, p. 840—§ 1810. See, also, *Employer and Employee* and *Minors, Infants, etc.*

§ 3. Department of mines.—See Code, §§ 1835-87.

LANDLORD AND TENANT

See *Justice of the Peace*, div. II (as to "Attachments"), and div. IV. (as to "Distress Warrants"); *Unlawful Detainer*.

- § 1. How the relation is created
- § 2. The different kinds of tenants or tenancies
 - (1) Life tenant
 - (2) Tenant for years
 - (3) Tenant at will; how tenancy terminated
 - (4) Tenant by sufferance; how tenancy terminated
 - (5) Tenant from year to year, or from month to month, etc.; how tenancy terminated
- § 3. Landlord's liability to strangers
- § 4. Tenant's liability to strangers
- § 5. Mutual obligations of landlord and tenant
 - (1) Landlord's duty to furnish habitable premises
 - (2) Duty as to repairs
 - (3) Tenant cannot deny landlord's title
 - (4) Landlord's duty to protect tenant in his possession and not to evict him; unlawful for tenant to remove without landlord's consent
 - (5) Rent
 - (a) Definition of rent
 - (b) Assignment of rents, and of the remedies therefor
 - (c) Apportionment of rent
 - (d) Reduction of rent if building destroyed or lessee deprived of possession
 - (e) How rent recovered; distress, etc.
 - (f) Covenant "to pay rent"
 - (6) Assignment or sublease of the premises
 - (7) Usual covenants in leases
 - (a) Covenant "for lessee's quiet enjoyment"
 - (b) Covenant "to pay rent"
 - (c) Covenant "to pay the taxes"
 - (d) Covenant "to repair"
 - (e) Covenant that "he will not assign without leave"
 - (f) Covenant for re-entry by lessor

- (8) Covenants running with the land
- (9) Tenant's right to firewood, etc.
- (10) Tenant's rights as to crops after end of lease, or emblements
- (11) Tenant's liability for waste
 - (a) Definition of waste
 - (b) Several kinds of waste
 - (c) What tenants are liable for waste
- (12) The law as to re-entry of premises
 - (a) Where tenant deserts premises
 - (b) Proceedings to establish right of re-entry, and Judgment therefor, etc.
 - (c) Covenant for re-entry
- (13) Lien of landlords and farmers for advances to tenants and laborers

§ 6. Various forms under "Landlord and Tenant"

§ 1. **How the relation is created.**—The relation of landlord and tenant is created by a lease or agreement of the parties, expressed or implied, creating a tenancy either for life, from year to year or month to month or week to week, or at will or by sufferance; or for a year or years, a month, or a week. By statute, if the lease is "for a term of more than 5 years," it must be by deed (a conveyance under seal) or will, and as to third parties it must be recorded. (Code, §§ 2413, 5192, etc.) If the term does not exceed five years, the Professor's Minor say the estate may be credited verbally (with entry upon the land), whether to commence at once or at a future time; but if the transaction is not a lease but a contract for one (as, where the lessee refuses to enter and take possession, and is sued for damages for breach of his contract), section 5561 of the Code says that no action shall lie upon "a contract for the lease of land for more than one year," unless it be in writing. (1 M's Real Prop., § 362.)

If the contract be to lease for one year or less, it may be verbal. Where the contract is for a lease exactly one year, though the lease is to be executed the next day, or is to be or may be executed within a year, it must, it seems, be in writing, under another clause of said section 5561, which says that "an agreement that is not to be performed within a year" must be in writing, though Prof. Raleigh Minor thinks otherwise. (M's Real Prop., § 363.) But if one actually leases it for over one, or two, or three, or four years (not over five), and enters under his common law lease, no writing is necessary.

If one having no title to land leases it, and he afterwards during the term acquires title, the lease is binding by the law of estoppel; if the title is only defective, estoppel does not apply, and he takes only the title leased. (1 M's Real Prop., § 364.)

A tenant is distinguished from a mere lodger in a hotel or boarding house in the former's exclusive control and possession of the premises, which the latter does not have; and the latter is not liable for rent or distress as a tenant, though he may be sued on his contract. (1 M's Real Prop., § 366.)

The true date of a lease is the date of its delivery to the lessee; and where a lease says so long "from the date" it is exclusive of that day. (1 M's Real Prop., § 367.) Section 5 (8) of the Code refers alone to statutes.

As to whether a writing is a present executed lease, with the possession to be given in the future, or a present agreement for a future lease, is a question of intention gathered from the surrendering circumstances as well as from the writing. If the intention was to part with the possession immediately or at any time before the execution of the lease proper, it is a lease; but if a fuller lease is to be executed before the possession is given, the first writing is a contract for a lease. (1 M's Real Prop., § 369.)

§ 2. The different kinds of tenants or tenancies.—Tenants or tenancies may be for an indefinite period, as, for life, from year to year, month to month, or week to week, or at will, or by sufferance; or for a definite period, as, for a year or years, a month, or a week. All the above tenancies or estate (except life estates) are called leasehold estates, as they are held under a lease, in contradistinction from all other estates, which are called freehold estates, which includes estate of inheritance and life estates.

(1) *Life tenant.*—He may be a tenant of an estate for his own life or the life of another. Two forms of life estates by action of law are, curtesy and dower—see *Courtesy* and *Dower*. For further as to life estates, see *Real Estate*.

(2) *Tenant for years.*—The tenancy here is for a time fixed by the lease. See further *Real Estate*.

(3) *Tenant at will; how tenancy terminated.*—See *Justice of the Peace*, div. III. (as to "Unlawful Detainer"), section 4, (2).

(4) *Tenant by sufferance; how tenancy terminated.*—See *Justice of the Peace*, div. III. (as to “Unlawful Detainer”), section 4, (3).

(5) *Tenant from year to year or from month to month, etc.; how tenancy terminated.*—see *Justice of the Peace*, div. III. (as to “Unlawful Detainer”), section 4, (1).

§ 3. Landlord's liability to strangers.—Generally a landlord is not liable to strangers for the negligent use of the premises while in the tenant's possession. But he is liable for a nuisance or the ruinous condition of a building thereon, at the time of the lease, or for the faulty or defective construction of a building. (1 M's Real Prop., § 395.)

§ 4. Tenant's liability to strangers.—His liability springs chiefly from his duty to repair and so to use the premises as not to injure others. If he can legally remedy the defect or cause of the injury, he cannot plead that it should under the contract be remedied by the landlord. He is liable for the careless and negligent use or management of the leased property, whereby one not on the premises is injured, as, where a passer-by is injured by the tenant's failure to keep the area in front of the house properly fenced, or the cellar door opening upon the street sufficiently closed, or by negligently throwing snow or ice from a roof into the street; or where he maintains a nuisance upon the premises, as, a sink or cesspool from which polluted water filters upon his neighbor's land, injuring a cellar or wall, or causing ill-health. Where a third person is on the premises by invitation, expressed or implied, or by his permission or license, the tenant must exercise reasonable care to prevent injury to him arising from any defect in the construction of the building, which he knows of, or has reason to apprehend. But he is not liable for injuries which ordinary precautions on the stranger's part might have prevented. But in the case of trespassers, he is liable only for gross negligence or wanton or malicious injuries. (1 M's Real Prop., §§ 396-8.)

§ 5. Mutual obligations of landlord and tenant.—

(1) *Landlord's duty to furnish habitable premises.*—A tenant is *quasi-purchaser*, and must inspect the property before leasing; *caveat emptor* (purchaser be aware) applies. The landlord does not warrant the good condition of the premises and the tenant cannot complain they were not, at the

commencement of the tenancy, in a habitable condition, or were not adapted to his purposes. But *caveat emptor* applies only to patent (open) and not to latent defects, not discoverable by inspection, as, concealed defects of construction, or the presence of a contagious or infectious disease. (1 M's Real Prop., § 400.)

(2) *Duty as to repairs.*—In the absence of a contract to repair a tenant is not required to repair the premises further than to prevent liability for waste (see (11), below); but he is expected to return the premises in substantially the same condition as when he received them, excepting natural deterioration and ordinary wear and tear. On the other hand the landlord, in the absence of an agreement to do so, is never bound to keep the leased premises in repair. (1 M's Real Prop., §§ 216, 401, 416.)

By statute, a covenant or stipulation, in a lease, that the lessee or tenant "will leave the premises in good repair," means that he will return the premises "in good and substantial repair and condition, reasonable wear and tear excepted"—thus imposing no greater duty than he would owe without the stipulation; but a covenant or promise that he will "keep or (these words inserted by the Revisors) leave the premises in good repair," does not of itself bind him to repair or rebuild, where buildings are destroyed by fire or otherwise, in whole or in part, without fault or negligence on his part, or where he is deprived of the possession of the premises by the public enemy. (Code, §§ 5179-80.)

(3) *Tenant cannot deny landlord's title.*—A tenant forfeits his estate, if he denies the landlord's title and claims adversely, but the disclaimer must be clear, positive, and continued, and known to the landlord. And in an action by a landlord, a tenant in possession, is estopped, so long as he retains possession under the lease, to deny that his landlord had title at the time he made the lease; but he may show that his title expired since the beginning of the term, either by its own terms or by transfer, or that it has been held invalid or sold at a judicial sale; and after surrender of possession the tenant may set up a superior title acquired by him while tenant, or where evicted or ousted by a superior title, he may set up such title against his landlord. And where a tenant in possession is induced, by fraud or mistake arising out of mis-

representations, to believe another has a better title and he takes a lease from him, he may deny the title. (1 M's Real Prop., §§ 212, 402.)

(4) *Landlord's duty to protect tenant in his possession and not to evict him.*—The landlord must see that the tenant has quiet enjoyment of the possession; but not as against any acts (short of eviction under superior title) of a stranger, trespasser, or wrongdoer acting without the landlord's authority, but only against the wrongful acts of the landlord himself or of those claiming under a superior title. The damages in case of eviction are measured by the value of the lease at the time or the total amount he has lost thereby. (1 M's Real Prop., § 403.)

If the tenant is evicted or ousted by the landlord, or by a stranger under a superior title, the rent is apportionately reduced, in case of the stranger, and (as a punishment) the entire rent for the term is suspended, in case of the landlord, even though the eviction be from a small part of the premises, and the tenant holds the rest; the tenancy is thereby terminated, and the tenant may now deny his landlord's title; and he may sue the landlord upon his covenant of quiet enjoyment, which the law implies if it is not expressed. An eviction may be actual, as, where the tenant or his sub-lessee is actually dispossessed of the premises or part thereof; or constructive, not involving an actual dispossession, but consisting of some permanent act (not merely a trespass or some temporary inconvenience), with the intention (implied if not expressed) to deprive the tenant of even a part of the premises, thereby depriving him of the full enjoyment of the premises, and inducing him to abandon the same in whole or in part. (M's Real Prop., § 419.)

On the other hand, by Acts 1922 it is provided: "It shall be unlawful for any person renting the lands of another, either for a share of the crop or for money consideration, to remove therefrom, without the consent of the landlord, any part of such crop until the rents and advances are satisfied. Every such offense shall be deemed a misdemeanor, and shall be punishable by fine or imprisonment,"—i. e., it would seem, by a fine not over \$500 or jail not over 12 months, or both (Code, § 4782).

(5) *Rent.*—(a) *Definition of rent.*—Rent is the return,

or compensation, in money or other thing, paid by a tenant to the landlord, for the possession of land.

(b) *Assignment of rents and of the remedies therefor.*—By section 5514 of the Code: "In conveyances or devises (wills) of rents in fee, with powers of distress and re-entry, or either of them, such powers shall pass to the grantee or devisee (one taking under a will) without express words. A grant or devise of a rent, or of a re-version or remainder (the estate left after the lease), shall be good and effectual without attornment of the tenant (i. e., his consent to be the other's tenant); but no tenant who, before notice of the grant, shall have paid the rent to the grantor, shall suffer any damage thereby"; and by section 5515, the acceptance of a third person by a tenant as his landlord, is void, unless with the landlord's consent, or pursuant to or in consequence of the judgment, order, or decree of a court.

See, also, sub-section (8), below.

(c) *Apportionment of rent.*—See *Apportionment*.

(d) *Reduction of rent if building destroyed, or lessee deprived of possession.*—Where land and buildings are leased, and the buildings are partially or wholly destroyed by fire or otherwise, without his fault or negligence, or he is deprived of the possession by the public enemy, there is a reasonable reduction of the rent for the time he is deprived of the property or possession until the same is restored. (Code, § 5180.)

(e) *How rent recovered; distress, etc.*—See *Justice of the Peace*, div. IV. (as to "Distress Warrants").

(f) *Covenant "to pay rent."*—See (7), (b), below.

(g) *Assignment or sublease of the premises.*—A tenant (except a tenant at will or by sufferance) may, if not restricted by the terms of the lease, sublease a part of his term or assign his entire interest in the whole, or a part thereof, the assignee (in the latter case) succeeding to the rights and liabilities of the lessee upon all covenants running with the land (see (8), below). (Code, § 5148; 1 M's Real Prop., § 371.) By statute, a covenant in a lease that the "lessee will not assign without leave," requires the leave to be in writing. (Code, § 5179.)

(7) *Usual covenants in leases.*—Of course the parties may put in a lease any covenants or stipulation they please, not contrary to law, thus changing the general law of landlord and tenant.

(a) *Covenant "for lessee's quiet enjoyment."*—This may be express or implied. By section 5181 of the Code: "A covenant 'for the lessee's quiet enjoyment of his term', shall have the same effect as a covenant that the lessee, his personal representative, and lawful assigns, paying the rent reserved, and performing his or their covenants, shall peaceably possess and enjoy the demised premises, for the term granted, without any interruption or disturbance from any person whatever."

Prof. Raleigh C. Minor thinks this "only protects the lessee against an eviction by the lessor, or by a stranger under a paramount title, and does not embrace mere acts of trespass or wrongdoing on the part of either lessor or stranger, not even an unlawful eviction by a stranger, which is also the scope of the implied covenant for quiet enjoyment." Such a covenant is implied, in case of a lease for years, but not in case of a lease for life. The damages for a breach of such a covenant, express or implied, is the value of the lease at the time of the eviction, or the total amount lost because thereof. (1 M's Real Prop., § 414.)

(b) *Covenant "to pay rent."*—This may be express or implied. By section 5178 of the Code: "In a deed of lease, a covenant by the lessee 'to pay the rent' shall have the effect of a covenant that the rent reserved by the deed shall be paid to the lessor, or those entitled under him, in the manner therein mentioned." The implied covenant ceases if the lessee assigns the premises, while the express covenant binds him personally, regardless of his interest in the land. (1 M's Real Prop., § 518.)

The effect of this covenant, express or implied, to pay rent, is further modified where the buildings are destroyed or the lessee is deprived of the possession,—see (5), (d), above.

(c) *Covenant "to pay the taxes."*—This covenant, in a lease, has "the effect of the covenant that all the taxes, levies, and assessments" upon the demised (i. e., leased) premises, or upon the lessor on account thereof, shall be paid by the lessee or those claiming under him." (Code, § 5178.)

(d) *Covenant "to repair."*—See (2), above.

(e) *Covenant that "he will not assign without leave."*—See (6), below.

(f) *Covenant for re-entry by lessor.*—This is important as it gives the lessor the right to enter, instead of resorting

to damages for breach of a covenant. Section 5182 of the Code gives an abbreviated form of the covenant: "If in a deed of lease it be provided that 'the lessor may re-enter for default of ——— days in the payment of rent, or for the breach of covenants,' it shall have the effect of an agreement that if the the rent reserved, or any part thereof, be unpaid for such number of days after the day on which it ought to have been paid, or if any of the other covenants on the part of the lessee, his personal representative, or assigns, be broken, then, in either of such cases, the lessor, or these entitled in his place at any time afterwards, into and upon the demised premises, or any part thereof, in the name of the whole, may re-enter, and the same again have, repossess, and enjoy, as of his or their former estate."

But before making the re-entry, the lessor must demand the payment of the rent, unless otherwise agreed. (81 Va. 118.)

For where a tenant in a city or town, or in case of suburban property, fails to pay rent, see *Justice of the Peace*, div. III. (as to "Unlawful Detainer"), section 4, (4).)

(8) *Covenants running with the land*.—Covenants in a lease or conveyance run or pass with the land when they are of such character that the benefits and burdens thereof pass with the land to the assignee, or into whosoever hands the land may come. In order hereto, two things must concur: (1) The covenant must refer to something which affects the nature, quality, or value of the land leased or conveyed, as, covenants by the tenant to pay rent or taxes or insurance, to leave the premises in good repair, or not to commit waste, etc.; or by the lessor, to repair, or for quiet possession, etc. The assigns (i. e., assignees) need not be named in the covenants in any case (Code, § 5170). But mere intention to bind assignees, as evidenced by the mention of them or otherwise, is not sufficient, as, a covenant not to hire certain persons to work, to build a house on other lands, to pay a certain debt to a stranger, to return cattle or ones of like kind leased with the premises. (2) In order for the covenant to run with the land, there must be the relation of grantor and grantee, or of landlord and tenant, or of lessor and lessee, or of lessee and assignee—there must be "privity of estate" between them, as it is technically called. But there is no "privity of es-

tate" between the original lessor and his tenant's sub-lessee of a part of his term (not premises), as the sub-lessee does not succeed to the entire interest (but only a part of the term) of the tenant in the whole or part of the premises. The assignee is primarily liable, while the lessee is liable as surety only. An assignee is liable for breaches or may hold his assignor liable for his occurring in his time while he is in possession; but neither is liable for breaches occurring before or after assignment. So, a covenant already broken ceases to run with the land; but the right to sue on the broken covenant may be assigned as any other chose in action, and the assignee may sue thereon. (1 M's Real Prop., §§ 421-3.)

And where the lessor sells or assigns his interest in the land (the reversion) section 5512 of the Code provides: "A grantee or assignee of any land let to lease, or of the reversion thereof; and his heirs, personal representative or assigns shall enjoy against the lessee, his personal representative or assigns, the like advantage, by action or entry for any forfeiture, or by action upon any covenant or promise in the lease, which the grantor, assignor, or lessor, or his heirs, might have enjoyed;" and reciprocally, by section 5513: "A lessee, his personal representative, or assigns, may have against a grantee or alienee of the reversion, or of any part thereof, his heirs, or assigns, the like benefit of any condition, covenant, or promise in the lease, as he could have had against the lessors themselves and their heirs and assigns, except the benefit of any warranty, in deed or law."

The statute applies where a part of the land or an estate for life or years therein, is assigned by the lessor holding the reversion. (1 M's Real Prop., § 424.)

The lessor remains personally liable on his covenants (though the assignee is also liable, since the privity or relation of contract continues. If the assignee comes in by a superior title, the statute does not apply. (1 M's Real Prop., § 424.)

See, also, *Conveyance*, section 8.

(9) *Tenant's right to firewood, etc.*—See *Real Estate*, section 1, (3).

(10) *Tenant's rights as to crops after end of lease, or emblements.*—By section 5540 of the Code, it is provided: "In

all cases the right to emblements shall be as at common law". Annual crops, which a tenant notwithstanding the termination of his lease, may continue to cultivate, harvest, and remove, are called "emblements"; and are regarded as personal property belonging to the tenant, or, if he be dead, to his personal representative. The doctrine applies only where the crops have been planted by the tenant himself or his agent, where the termination of the tenancy is uncertain, and where it is actually terminated before harvest, without his fault or act, but only by the act of the lessor or some third person, or of the law, or of God. So the right belongs to a tenant for life or for another's life, or other uncertain or conditional tenancy, tenant from year to year (where the landlord ends the tenancy by notice), tenant for years (where the tenancy ends irregularly, and unexpectedly), and tenant at will (where the tenancy ends without his default), but not to a tenant by sufferance. (1 M's Real Prop., § 44.)

By statute the tenant must pay a reasonable rent for so much of the land as is occupied by the emblements, in the same proportion as it shall bear in quantity and value to the entire premises, such rent to be apportioned among the owners of the land according to their respective interests. And if the land be prepared by the tenant for a crop, though not actually planted, he is entitled to a reasonable compensation therefor from the landowners. (Code, §§ 5541-2.)

Emblements will not be allowed, of course, where the tenant expects his term to end (as where it is for a term certain, say, one year), and yet he plants; nor where the estate, though of uncertain duration, is terminated before harvest by his own act or default; nor where the crops were not planted by the tenant or his agent; nor where the land is lost to the tenant by a superior title, but a superior lien is not a superior title. But in case of a widow holding a dower, which is a tenancy for life, the personal representative is not entitled to emblements, because she got the crops at her husband's death. (1 M's Real Prop., §§ 45-50.)

By statute it is provided, that an under-tenant or assignee of a tenant for life or other uncertain interest, has the same rights as to emblements as the latter; or, in lieu thereof, the under-tenant (but perhaps not the assignee), may hold the land until the end of the current year, paying rent therefor,

apportioned between the tenant for life or other uncertain term, or his personal representative, and those who have succeeded him in the ownership of the land. (Code, § 5543.)

As to when growing crops may be levied on, see *Sheriff, Sergeant, Constable, etc.*, section 13.

(11) *Tenant's liability for waste.*—(a) *Definition of waste.*—Waste is any permanent injury to the estate from the tenant's voluntary or negligent act or that of his servants. Such injury caused by an act of God (as, by tempest, lightning, flood, or the like, if such act was not itself caused by the tenant's neglect), or by act of a public enemy, or by pure accident (as, an accidental fire), is not waste, but further damage through the tenant's failure promptly to repair, temporarily, at least, such injury (as by putting on a roof taken off by tempest), is waste. But the tenant need not make general repairs or restore the premises to their former condition. (1 M's Real Prop., § 426.)

(b) *Several kinds of waste.*—Waste is,—(1) *Voluntary Waste*, as, the destruction or altering of houses; cutting timber, except in case of extensive forests where cleared land is worth more than it is with the timber on it, and except wood for firewood, fences, etc., (necessary for repair and improvement), and the like; and underwood cut for thinning the growth or otherwise; changing the course of husbandry, as converting arable land to meadow, or meadow into pasture, or either unto wood, and *vice versa*, etc.; taking the earth, stone, clay, gravel, minerals, oil, gas, etc., by the tenant, unless that was one of the recognized modes before of making profit from the land, or the mining is of the same vein already opened or under it, but if the lease is of "land and mines" and there are no open ones, new ones may be opened; or removing fixtures that are a part of the realty (see title *Fixtures*): (2) *permissive or negligent waste*, as, suffering a house to fall or deteriorate for want of necessary repairs, or other negligent (but not a mere accidental) act of destruction: and (3) *equitable waste*, such as the common law would not notice, but which a court of equity relieves, as, the destruction of ornamental, shelter, and shade trees; or the wilful or malicious destruction of the premises, which will be enjoined; or injuries to equitable owners, as, where there is mortgage or other lien, express or implied. (1 M's Real Prop., §§ 427-36.)

(c) *What tenants are liable for waste.*—By statute, if “any tenant”—tenants in common, joint tenants and parceners—or a guardian, or a person in possession of land pending a suit therefor, commit waste, or after he has conveyed it, while he remain in possession, unless by special license to do so, he is liable to any party injured, for damages; or if such a tenant commit waste, he is liable to his co-tenants jointly or severally for damages. If the waste was “wantonly” (or recklessly) the damages are double; if committed pending a suit the damages are treble. (Code, §§ 5506-9, 5511.)

It is also waste for a tenant to sell or remove manure from the land—see *Fixtures*, section 4.

(12) *The law as to re-entry of premises.*—

(a) *Where tenant deserts premises.*—“If any tenant from whom rent is in arrear and unpaid shall desert the demised premises and leave the same uncultivated or unoccupied, without goods thereon subject to distress sufficient to satisfy the said rent, the lessor or his agent may post a notice, in writing, upon a conspicuous part of the premises, requiring the tenant to pay the said rent, in the case of a monthly tenant within ten days, and in the case of a yearly tenant within one month from the date of such notice. If the same be not paid within the time specified in the notice, the lessor shall be entitled to possession of the premises and may enter thereon, and the right of such tenant thereto shall thenceforth be at an end; but the landlord may recover the rent up to that time.” (Code, § 5518.)

(b) *Proceedings to establish right of re-entry and judgment therefor, etc.*—See Code, §§ 5530-9, 5805-9.

(c) *Covenant for re-entry.*—See (5), (f), above.

(13) *Lien of landlords and farmers for advances to tenants and laborers.*—See *Liens of Mechanics and Others*, section 26.

§ 6. Various forms under “Landlord and Tenant.”—

NO. 1. STATUTORY FORM OF LEASE, WITH COVENANTS.

(Code, §§ 5165, 5178-81.)

— This deed, made the ——— day of ———, in the year 192—, between P. P. and D. D., witnesseth: that the said P. P. doth demise unto the said D. D., his personal representatives and assigns [here

describe the property] from the ——— day of ———, 192—, for the term of ——— months (or *years*, or as the case may be), thence ensuing, yielding therefor during the said term the rent of [here state the rent and mode of payment; and any, all or none of the following covenants, or other covenants or stipulations, as the parties may have agreed on]:

And the said P. P. covenants for the lessee's quiet enjoyment of his term.

And the said D. D. covenants to pay the rent and to pay the taxes; and that he will not assign without leave; that he will leave the premises in good repair; and that the lessor may re-enter for default of ——— days in payment of rent, or for the breach of any covenant. Witness the following signatures and seals.

P. P. [L. s.]
S. S. [L. s.]

No. 2. A MORE COMPREHENSIVE FORM OF LEASE

(4 Min. Inst. 1600; Tate's Forms, 155.)

This indenture, made this ——— day of ———, in the year of our Lord 192—, between C. C., of ———, of the one part, and D. D., of ———, of the other part, witnesseth: That in consideration of the rents, provisos and agreements hereinafter contained, and which, on the part of the said D. D. and his assigns, are to be paid, done, and performed, the said C. C. doth grant, bargain, sell, lease, demise, and to farm let, unto the said D. D. and his assigns, all that lot, messuage and tenement situate and being in the [describe the property particularly], together with all houses and buildings, easements, alleys, ways, profits, and appurtenances whatsoever, to the said lot, messuage, and tenement belonging, or in any wise appertaining; to have and to hold the said lot, messuage, and all and singular the premises hereby demised, with the appurtenances aforesaid thereto belonging, unto the said D. D. and his assigns, from the day of the date hereof, for and during the term of ——— years next ensuing, and fully to be complete and ended, yielding and paying therefor, to the said C. C., and his assigns, during the said term, a rent of ——— dollars yearly, in gold, in equal quarterly payments, on the ——— day of ———, ———, ———, and ———, respectively, in each year. And the said C. C., for himself and his heirs, doth covenant and agree with the said D. D. and his assigns, that he paying the rent hereinbefore reserved, and otherwise keeping and performing all and singular the covenants and agreements herein contained, on his or their part, to be observed, kept, and performed, shall peaceably and quietly, during the said term of ——— years, possess and enjoy the said lot, messuage and tenement, with the appurtenances aforesaid, without let, hindrance, molestation, or disturbance from any one whatsoever. And it is agreed by and between the said parties, that if, at the expiration of the said term of ——— years, the said D. D. shall desire to retain the said lot, messuage, and tenement, with the appurtenances aforesaid, for ——— years next after the expiration

of the said term of ——— years, the said D. D. shall have power and right so to retain the same on the terms, stipulations, and covenants herein expressed, touching the term of ——— years next ensuing the date thereof.

And the said D. D., for his heirs and assigns, doth covenant and agree with the said C. C., and his heirs and assigns, in manner following, that is to say:

That the said D. D., his heirs and assigns, will, during the said term, well and truly pay, in gold, to the said C. C., and his assigns, the said yearly rent of ——— dollars in the manner hereinbefore limited and appointed, according to the reservation thereof, except the said messuage, tenement, and premises, or some part thereof, shall happen to be burnt down, or damaged by fire, tempest, or other casualty not occasioned by the default of the said D. D. or of his assigns; in either of which cases the said rent is either to cease or to be fairly apportioned, according as the said destruction of the said messuage, tenement and premises is entire or partial;

That the said D. D., his heirs or assigns, shall and will, during the said term, pay all taxes, levies, assessments upon the said demised premises, or upon the said C. C., on account thereof;

That the said D. D., or his assigns, will not, during the term aforesaid, assign or under-let the said demised premises, or any part thereof, to any person whatsoever, without the consent in writing of the said C. C., his heirs or assigns;

That the said D. D., or his assigns, at the expiration or other sooner determination of the said term of ——— years, will peaceably surrender and yield up unto the said C. C., his heirs or assigns, the premises demised, with the appurtenances aforesaid;

That the said D. D., his heirs or assigns, shall and will, at his or their proper costs and charges, from time to time, and at all times hereafter, during the said term, well and sufficiently repair and cleanse the said messuage and tenement, and all and singular other the premises hereby demised, and every part and parcel thereof, by and with all, and all manner of needful and proper reparation, so as to preserve the same from decay and deterioration, excepting any casualty by fire or other occurrence which may consume or destroy the said messuage, tenement, and premises, or any part thereof, without default on the part of the said D. D., or his assigns; it being understood by and between the parties hereto, that such loss or injury happening to the said messuage, tenement, and premises, without any default on the part of said D. D., or his assigns, is to be sustained by the said C. C., his heirs or assigns, and that on the happening of such injury or destruction as aforesaid the said D. D., is to be entirely discharged from the obligations of this indenture, unless the said C. C. shall, within a reasonable time after notice to him in writing of such complete or partial destruction, rebuild or repair the said messuage, tenement, and premises, so that the same shall be in as good a condition as before such casualty occurred, and until such rebuilding or repairs shall be completed, the said rent is to be suspended or duly apportioned;

That the said D. D., and his assigns, shall not use nor employ the said messuage, tenement or premises, or any part thereof, in any other way or manner than as the same have been customarily used by previous occupants thereof, within ten years last past; and

That in the event of a default of ——— days in the payment of any of the instalments of the rent hereinbefore stipulated for, or of the breach of any of the covenants and agreements herein contained, on the part of the said D. D., his heirs or assigns, to be observed, kept, or performed, the said C. C., his heirs or assigns, at any time afterwards, into and upon the demised premises, or any part thereof, in the name of the whole, shall and may re-enter, and the same again have, re-possess, and enjoy, as of his or their former estate.

Witness the hands and seals of the parties, the day and year first above written.

C. C. (SEAL.)

D. D. (SEAL.)

No. 3. LEASE OF WATER POWER

(4 Min. Inst. 1602; Tate's Forms, 161.)

This indenture, made this ——— day of ———, in the year of our Lord, 192—, between C. C., of ———, of the one part, and D. D., of ———, of the other part; witnesseth that the said C. C., in consideration of the rents and covenants hereinafter reserved and stipulated on the part of the said D. D. to be paid and performed, doth grant, demise and lease, unto the said D. D., and his assigns, the right and privilege of using the water passing from the mill of the said C. C., situate on the ———, after it has worked the said mill, in the construction or propelling of any kind of machinery at the factory of the said D. D., or for any other purpose to which the said D. D., or his assigns, may think fit to apply the same, except for that of working a mill to grind grain, and with this reservation and restriction, as fully and amply, to all intents and purposes, as the same may now be applied and used by the said C. C., to have and to hold the said right and privilege of the water aforesaid, and to use and enjoy the same, subject to the exception and restriction aforesaid, unto the said D. D., and his assigns, for and during and until the full end and term of ——— years, from the ——— day of ———, in the year 192—. Yielding and paying therefor, unto the said C. C., and his assigns, during every of the said years, in gold, the annual sum of ——— dollars, by quarterly payments of ——— dollars each, the first whereof is to be paid on the ——— day of ———, in the year 192—. And the said C. C., for himself, his heirs and assigns, doth covenant and agree with the said D. D., and his assigns, that the said D. D., and his assigns, shall have and enjoy the water as aforesaid, except such casual hindrance and interruption as may be caused by the needful repairs in and about the said mill of the said C. C., or any of appurtenances thereto belonging, which shall be made with as little delay as possible, after reasonable notice given to the said D. D., and his assigns, of the intended interruption of the regular flow of the water.

And the said D. D., for himself, his heirs and assigns, doth covenant and agree with the said C. C., and his assigns, that the said D. D., his heirs and assigns, will well and truly pay to the said C. C., and his assigns, the said rent, in gold, during the said term, at the periods aforesaid; and also, that the said D. D., and his assigns, will not use nor employ the water aforesaid for the working of any mill for the grinding of grain; and it is by these presents agreed and provided, that the right and privilege on the part of the said D. D., and his assigns, of using the said water for any purpose whatsoever, shall *ipso facto* immediately cease if the said D. D., or his assigns, shall, in violation of the provisions in this indenture contained, proceed to apply the same to the working of a mill or other machine for the grinding of grain.

Witness the hands and seals of the said parties, the day and year first above written.

C. C. (SEAL.)

D. D. (SEAL.)

No. 4. ASSIGNMENT OF A LEASE
(Sands' Forms, p. 28.)

Know all men by these presents, that A. B. of ———, for and in consideration of the sum of ——— dollars to him in hand paid by E. F., of ———, the receipt whereof I hereby acknowledged, hath bargained, sold, assigned, transferred and set over, and by these presents doth bargain, sell, assign, transfer and set over unto the said E. F., his executors administrators and assigns, all and singular, &c., and premises comprised in the within written indenture, and therein mentioned to be thereby demised, with their and every of their appurtenances, together with the within indenture of lease, and all the estate, right, title and interest which he, the said A. B., now hath, or at any time hereafter shall or may have, claim, challenge or demand of, in or to all or any of the said premises, by virtue of the said indenture of lease, or otherwise. To have and to hold the said messuage, &c., and all and singular other the premises, with their and every of their appurtenances, unto the said E. F., his executors, administrators and assigns, for and during all the rest, residue and remainder yet to come and unexpired of the within mentioned term of ——— years, in as full, ample and beneficial a manner, to all intents and purposes whatsoever, as he, the said A. B. his executors or administrators, might or could in any manner have held and enjoyed the same, if these presents had not been made, subject, and without prejudice, to the yearly rent of ——— dollars, in and by the said indenture of lease reserved and contained, and to become due and payable, and to all and every the covenants, clauses, provisos and agreements therein contained. And the said A. B., for himself, his heirs, executors and administrators, doth hereby covenant and declare, to and with the said E. F., his executors, administrators and assigns, that he, the said A. B., hath not, at any time heretofore, made, done, committed or executed, or wittingly or willingly permitted or suffered any act, deed, matter or thing whatsoever, whereby or wherewith, or by reason or

means whereof, the said messuage and premises hereby assigned or intended so to be, are, is, may, can or shall be in any ways impeached, charged, affected or incumbered in title, charged, estate or otherwise howsoever.

In witness whereof the said A. B. hath hereunto set his hand and seal, on this _____ day of _____, 192—.

A. B. [SEAL.]

No. 5. NOTICES TO TERMINATE THE SEVERAL TENANCIES

[See Nos. 10-13, under *Justice of the peace*, div. III. (as to "Unlawful Detainer").]

No. 6. VARIOUS FORMS UNDER "UNLAWFUL DETAINERS"

[See Nos. 1 to 9, under *Justice of the Peace*, div. III. (as to "Unlawful Detainer").]

No. 7. VARIOUS FORMS UNDER "DISTRESS WARRANT"

[See Nos. 1 to 7, under *Justice of the Peace*, div. IV. (as to "Distress Warrants").]

No. 8. CROP LIENS

[See under title *Lien of Mechanics and Others*.]

LAND OFFICE

For warrants and grants from land office and escheats, see Code, §§ 414-522; and Acts 1922, amending § 417; also *Escheat and Escheator*.

LARCENY

See *Embezzlement; Cheats, False Pretense, Deceits, and Other Frauds*

I. THE STATUTES

- § 1. Grand and petit larceny defined; how punished; larceny of horse, mule, ass, cow, steer, bull, or calf; how punished

- § 2. Larceny of bank notes, checks, etc., or any book of accounts; how punished
- § 3. Larceny may be of things fixed to the freehold
- § 4. Certain dogs not assessed subject to petit larceny and trespass
- § 5. Theft or destruction of public records by others than officers; how punished
- § 6. Removed, etc., of goods distrained or levied on with intent etc., larceny
- § 7. When person convicted of petit larceny has been before sentenced for like offense; how to be confined
- § 8. When, in prosecution for grand larceny, accused may be found guilty of, and sentenced for, petit larceny
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I. THE STATUTES

§ 1. Grand and petit larceny defined; how punished; larceny of horse, mule, ass, cow, steer, bull, or calf; how punished.—"If any person steal from the person of another money or other thing of the value of \$5 or more he shall be deemed guilty of grand larceny and be confined in the penitentiary not less than one nor more than ten years. If any person commit simple larceny not from the person of another of goods and chattels he shall if they are of the value of \$50 or more be deemed guilty of grand larceny and be confined in the penitentiary not less than one nor more than ten years; and if they be of less value than \$5 in the first case or \$50 in the last he shall be guilty of petit larceny and shall be punished by confinement in jail not less than 10 days nor more than 12 months or by fine not less than \$5 nor more than \$100, or both. But any person who shall be guilty of the larceny of a horse, mule, or ass shall be punished by confinement in the penitentiary not less than 3 nor more than 18 years; and any person who shall be guilty of the larceny of a cow, steer, bull or calf, shall in the discretion of the jury be confined in the penitentiary not less than one nor more than five years or be confined in jail not exceeding 12 months and fined not exceeding \$500." (Code, § 4440.)

Stealing sand on the banks of the Potomac river, is a felony—Code, § 4441.

§ 2. Larceny of bank notes, checks, etc., or any book of

accounts; how punished.—"If any person steal any bank note, check, or other writing, or paper of value, whether the same represents money, and passes as currency, or otherwise, or any book of accounts, for or concerning money or goods due or to be delivered, he shall be deemed guilty of larceny thereof, and receive the same punishment, according to the value of the thing stolen, prescribed for the punishment of the larceny of goods and chattels. The provisions of this section shall be construed to embrace all bank notes, and papers of value representing money and passing as currency, whether the same be the issue of this State or any other State, or of the United States, or of any corporation, and shall include all other papers of value, of whatever description." (Code, § 4442.) "In a prosecution under the preceding section, the money due on or secured by the writing, paper, or book, and remaining unsatisfied, or which in any event might be collected thereon, or the value of the property or money affected thereby, shall be deemed to be the value of the article stolen." (Code, § 4443.)

§ 3. Larceny may be of things fixed to the freehold.—"Things which savor of the realty, and are at the time they are taken, part of the freehold, whether they be of the substance or produce thereof, or affixed thereto, shall be deemed goods and chattels, of which larceny may be committed, although there be no interval between the severing and taking away." (Code, § 4444.) Sand or gravel along streams, etc., is also a subject of larceny, and its stealing is punishable by a fine not over \$300, or jail not over 6 months, or both—Acts 1920 p. 284.

§ 4. Certain dogs not assessed subject to petit larceny and trespass.—"All dogs in the cities of Richmond, Petersburg, and Alexandria and in the county of Henrico, whether listed for taxation or not, shall be deemed personal property, and may be the subject of petit larceny and malicious or unlawful trespass." (Code, § 4445.) See, also, *Animals, Fowls, etc.*, and *Dogs*.

§ 5. Theft or destruction of public records by others than officers; how punished.—"If any person steal, or fraudulently secrete or destroy, a public record or part hereof, he shall, if the offense be not embraced by section 4516 (see *Records (Offenses Concerning)*, section 1), be confined in jail

not exceeding one year, and fined not exceeding \$1,000". (Code, § 4518.)

§ 6. Removal, etc., of goods distrained or levied on with intent, etc., larceny.—"If any person fraudulently remove, destroy, receive, or secrete any goods and chattels that have been distrained or levied on, with intent to defeat such distress or levy, he shall be deemed guilty of larceny thereof." (Code, § 4447.)

§ 7. When person convicted of petit larceny has been before sentenced for like offense; how to be confined.—"When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or, by the jury or justice before whom he is tried, found, that he has been before sentenced in the United States for the like offense, he shall be confined in jail not less than thirty days nor more than one year; and for a third, or any subsequent offense, he shall be confined in the penitentiary not less than one nor more than two years." (Code, § 4785.)

Confinement commences after previous term expires—Code, § 4786.

§ 8. When, in prosecution for grand larceny, accused may be found guilty of, and sentenced for, petit larceny.—"In a prosecution for grand larceny, if it be found that the thing stolen is of less value than \$50, the jury may find the accused guilty of petit larceny; and in a prosecution for petit larceny, though the thing stolen be of the value of \$50 or more, the jury may find the accused guilty; and in either case he shall be sentenced for petit larceny." (Code, § 4921.)

§ 9. Where stolen property brought into State, prosecuted here.—"If any person commit larceny or robbery beyond the jurisdiction of this State and bring the stolen property into the same, he shall be liable to prosecution and punishment here." (Code, § 4769.)

II. DISCUSSION OF LARCENY

§ 10. Definitions.—The statute (see section 1, above), does not define larceny, but merely classifies larceny into grand or petit (pronounced "petty"), according to the degree of the offense. ("Simple" larceny is used as distinguished from compound larceny, i. e., stealing from the person, or by violence, the latter being robbery.)

Grand larceny is the stealing from the person of another, money or other thing of the value of \$5 or more; or the committing of simple larceny, not from the person, of the goods and chattels of the value of \$50 or more. Grand larceny is a felony, and punishable by confinement in the penitentiary not less than one nor more than ten years.

Petit larceny is the stealing from the person of another, money or other thing of less value than \$5; or the committing of simple larceny, not from the person, of goods and chattels of less value than \$50. Petit larceny is a misdemeanor, punishable by imprisonment in jail not less than fifteen days nor more than six months, or by fine not less than \$5 nor more than \$100, or by both. But the larceny of a horse, mule, ass, cow, steer, or bull, is made a felony, regardless of the value.

The statute says if any person "steal" or commits "simple larceny," leaving it to the common law to say what "stealing" or "simple larceny" is. Simple larceny, whether petit or grand, is the wrongful or fraudulent taking of personal goods of some intrinsic value belonging to another, without his consent, and with the intention to deprive him thereof permanently. (H's G. & M. p., 178.)

§ 11. The taking necessary to larceny.—

(1) *Definition of a taking.* Taking, whether in secret or openly, is the getting possession of a thing by such seizure or bodily act as amounts to a trespass. To get possession there must be a severance of the thing from the possession, actual or constructive, of the owner. Taking, therefore, includes the idea of asportation or carrying away, which indeed, is satisfied by the least removal.

(2). *The taking may be actual or constructive.*—The taking may be actual, as where there is a direct taking of actual possession by the thief himself or by him through the instrumentality of another; or the taking may be constructive, as where there is no actual taking but a delivery to the accused by the owner himself, and yet the law in the interests of society, holds it to be a taking nevertheless.

(3) *Instances of constructive taking at common law:*

(a) *Where the accused has the mere charge or custody of the property; or the special use; or has it for a special purpose.*—Thus, in the cases of butlers, shepherds, merchants clerks, &c., of guests at an inn as to furniture thereof, and of

porters of baggage, &c.—in all of these cases if there be an appropriation to their own use of what is committed to them, the law presumes a taking, and the offense is larceny.

(b) *Where the possession is obtained by fraud and with an original intent to steal.*—Thus, where possession is obtained by hiring a horse under the false pretence of a journey; or where possession is obtained on a pretended treaty to buy or to get the goods for another, or on condition to return, or the like, the taking is sufficient for the larceny of the goods. But where the owner is induced by false pretences to part with the property and not merely the possession thereof, there can be no larceny at common law, but there may be by statute in Virginia.

(c) *Where the privity of contract under which the delivery of the goods was obtained is at an end at the time of conversion.*—As where the bailment is ended by the tortuous act of the bailee, or otherwise, and the property is then converted to his own use.

(4) *Taking must be without owner's consent.*—The taking must always be *invito domino*—i. e., without the owner's consent; but taking by its very definition imports want of consent, for if with consent it is no trespass, and hence no taking.

Therefore, it is no larceny—

(a) Where the taking is induced or assented to by the owner, even though the object be to detect a thief, and the act was committed without knowledge of the owner's consent; but otherwise, if the owner only suffers the act and afford facilities for its commission.

(b) Where the taking is induced or the delivery of the goods is made by the owner's servant, it is not larceny if the servant acted by the master's direction; but if there be no direction by the master, then it is larceny if the servant is a bailee and so the special owner thereof, and capable of giving consent, though otherwise if he had a mere charge of the goods.

(c) Where the taking is with the consent of the owner's wife it is no larceny, for in contemplation of law the wife is one with her husband, and moreover has a *quasi* property in her husbands' goods; but it is otherwise if the taker is her adulterer. (H's G. & M. pp. 179-82.)

§ 12. Intent in taking.—

(1) *The intent necessary to constitute larceny.*—To constitute larceny, the taking must be *animo furandi*, or with a wrongful or fraudulent intent to deprive the owner permanently of his goods, and this intent must exist when the accused first came into possession of the chattel, and if it exist then, his guilt is not purged by returning the goods. If the intent to appropriate be formed after possession is acquired (of which the justice or jury must judge), it is not larceny proper.

The taking must be not only *animo furandi*, but also *lucri causa*, or for the sake of gain; and in this connection Mr. Minor observes that "such refinements are indulged as to what is the nature of the gain required, as to annul the effect of that element of the description and to warrant its pretermis-sion."

(2) *As to possession of goods stolen or lost.*—Exclusive possession of goods recently stolen, unless explained, is *prima facie* evidence of the theft; but this presumption, as in other cases, may be strengthened or weakened by circumstances. But mere possession of goods which have been actually lost is not *prima facie* proof of guilt.

(3) *Defences to repel fraudulent intent.*—

(a) Taking under a *bona fide* claim of right, upon a fair pretense of property, although ill-founded, is not larceny.

(b) Taking in good faith by accident or mistake, is not larceny.

(c) Taking as a mere trespasser, without intending to appropriate, is not larceny: Thus, taking a horse to ride a journey only; a plow to use for a time only; a coat for a particular and temporary purpose only; or in a wanton spirit, only to annoy—these are not larceny; even though the articles are not returned, but are abandoned. Also an offer of full compensation at the time of taking tends strongly to disprove the criminal intent, but not necessarily to repel it.

(d) As to taking goods actually lost there are three cases to be observed: (1) Where upon the finding there is no intention to appropriate the goods, but afterward they are appropriated, it is not larceny; (2) where upon the finding, the finder believing or having reason to believe the goods to be lost, but not knowing the owner nor having from marks on the

the goods the means to find him, appropriate them immediately, it is not larceny; (3) where, in a like case as the last, the finder knows the owner, or from marks on the goods can ascertain him, it is larceny.

(e) Taking by necessity, as in hunger, &c., is a palliation rather than an excuse, and from considerations of public policy is not admitted by the law as a defense. (H's G. & M., pp. 182-3.)

§ 13. *Subjects of larceny.*—

(1) *As to subjects of larceny generally.*—By virtue of the common law, larceny may be of all kinds of goods and chattels, animate and inanimate, wherein there may be property in possession, and which have an intrinsic value, even though less than the smallest coin; and by statute in Virginia, larceny may be committed of things not thus embraced by the common law.

(2) *Larceny of bank, notes, checks, bonds, etc.*—At common law, bank notes, bonds, bills, and other securities are not subjects of larceny, because, being mere choses in action and having no corporeal existence, they import no property in possession and besides have no intrinsic value. But otherwise by statute (see section 2, above).

(3) *Larceny of records, process, and letters.*—These are not subjects of larceny at common law, because they have no intrinsic value. But, by statutes in Virginia (see section 5, above), it is a substantive offense to steal or fraudulently to secrete a public record, or part thereof, and is punishable by fine and imprisonment. And although letters are not subjects of larceny by any statute in Virginia, yet by statute of United States, letters in the post-office or in the mail are subjects of larceny.

(4) *Larceny of human remains, coffin, and shroud.*—Dead bodies of human beings are not subjects of larceny at common law, for no property exists in them; but otherwise as to grave clothes and coffins, which belong to the personal representative or to the person who supplied them. But, by statute in Virginia (see section 4552), unlawfully to disinter or to displace a dead human body is a felony—see *Burying Grounds*.

(5) *Larceny of dogs and other animals of curiosity.*—Dogs, cats, parrots, monkeys, and other animals kept for

whim or pleasure, are not, by the common law subjects of larceny, having no such value as would entitle them to that distinction; yet a civil action may be maintained for them. In this connection Mr. Minor suggests that "perhaps when animals of this description have a pecuniary value apart from the whim or caprice of the owner, as in case of persons who deal in them as articles of merchandise, or of a trained shepherd's dog, and the like, they may be the subjects of larceny." But as to dogs, see section 4, above.

(6) *Larceny of animals of a wild nature.*—Animals *feræ naturæ* or of a wild nature, which have not been reclaimed and appropriated, are not subjects of larceny, for there is no property in them; but otherwise if they have been reclaimed and appropriated, for then there may be an absolute or qualified property in them.

(7) *Larceny of deeds and other writings touching realty.*—No larceny can be committed, at common law, of deeds and other written assurances concerning realty, for besides savoring of the realty, they have no intrinsic value. But Mr. Minor says it is probably otherwise by statute in Virginia (see section 3, above) as they savor of the realty. (H's G. & M., pp. 183-7.)

§ 14. Concerning ownership of goods and their description.—

(1) *The ownership may be general or special.*—By the definition of larceny the goods must belong to another, by which is not meant that the person from whom they are taken must be the absolute owner thereof; for, in law, a thing may have two owners, one having the absolute or general property in the thing, and the other a qualified or special property in it, thus, where the right of property is separated from the possession, as in the case of bailment of goods, where the general property is in the bailor, while the special property is in the bailee. So likewise where a thief steals from a thief, the true owner of the goods has the general property and the thief from whom they are again stolen has the special property.

(2) *Ownership must be alleged and proved.*—By the common law, as well as by the statute in Virginia (see section 4872 of the Code), ownership may be alleged in the indictment or warrant, to be in any one having either a general or

a special property in the goods stolen. Ownership, however, whether general or special, must be stated, and stated truly, if the owner be known; if not known, the indictment must aver the owner to be unknown, and the jury must be satisfied that the goods were stolen. But the omission to state ownership is cured by the verdict. And the proof of ownership must correspond with the averment, for if the owner be misnamed, the variance is fatal; but such variance may be avoided by inserting counts charging the ownership in as many ways as there are parties interested.

(3) *Averment of ownership in case of coffin or shroud.*—As to coffins and shrouds, the indictment may allege the ownership to be in the personal representative of the deceased, or the person who supplied them.

(4) *Averment of ownership in case of bailment.*—Whenever a person has a special property in a thing, or holds it in trust for another, as in case of bailment, the property may be laid in the general owner (the bailor), or in the special owner (the bailee). But where a person bails goods to another and then steals them himself in order to charge the bailee with their value, in such a case the ownership must be laid in the bailee. And it may be here observed that it is not necessary to state that the property was taken from the possession of any one; but if it is so stated, it must be proved as alleged, and possession of the bailee is not that of the bailor.

(5) *Averment of ownership where possession is tortuous.*—Where possession of property is tortuously acquired, the property may be alleged to belong to the true owner or to the tortuous possessor, even though the latter had himself stolen it.

(6) *Averment of ownership of clothes, etc., for children.*—Clothes and other necessities provided by a parent for his minor child may be laid as the property of either the parent or such child.

(7) *Averment of ownership of goods in custody of law.*—Where goods are in custody of the law, as where they are levied on, they may be laid either in the true owner or in the officer making the levy.

(8) *Averment of ownership of goods in custody of servant.*—Where goods are in custody of servants, they must, in general, be alleged to be the property of the master; but

otherwise if the servant has not the mere care of, but the property in, them as temporary bailee.

(9) *Averment of ownership of church or corporation.*—In case of goods belonging to a church, they may be averred to be the property of the trustees, &c., but goods of a corporation must be alleged to belong to it by its corporate name.

(10) *Averment of ownership of goods of a deceased.*—Goods of a deceased person may be laid as the property of the personal representative, or of the person in whose custody as temporary trustee goods are. A personal representative has *per se* such a special property as will permit the goods to be laid as his individually.

(11) *Averment of ownership in case of married women.*—In general, goods must be, at common law, alleged to be the property of the husband; but under our married woman's law they may be her own property and if so, the averment of ownership should conform to the fact, although if the husband live with the wife, he has such a special property in her goods that they may be laid as his.

(12) *Ownership of joint tenants and tenants in common.*—Where the things belong to the taker and another in conjunction, as in case of joint tenants and tenants in common, the taking is no larceny, because each is entitled to the possession; but where a stranger is the taker, it is larceny, and the property of such tenants must be laid jointly and the names of all the tenants must be correctly given.

(13) *What description of stolen goods necessary.*—The indictment must describe the articles stolen specifically, by the names usually appropriated to them, and the number and value of each species of goods must be stated. For what description is sufficient of money stolen, see section 3994 of the Code, as amended by Acts 1897-8, p. 638. (H's G. & M., pp. 186-80.)

III. RECEIVING STOLEN GOODS

§ 15. *Receiving, etc., stolen goods knowing, etc., larceny; prosecution therefor.*—"If any person buy or receive from another person, or aid in concealing any stolen goods, or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted." (Code, § 4448.)

Receiving, buying, or aiding in concealing stolen goods, knowing them to be stolen, was only a high misdemeanor at common law; the offender could not be a felon as accessory after the fact, the goods, only and not the felon being received.

To convict under this statute four things must be proved:

(1) That the goods were stolen by some person; (2) that the accused bought or received them from another person, or aided in concealing them; (3) that at the time he knew they had been stolen; and (4) that he bought, received, or aided in concealing them with a dishonest intent.

(1) *How the offense may be proved.*—To prove the offense the thief is a competent witness; but his testimony, like that of all other accomplices, should be scrupulously weighed, and upon it alone a conviction should rarely or never be had. Guilty knowledge may be inferred from inadequacy of price, irresponsibility of vendor, secrecy of transaction, concealment of the goods, or the like; and for the purpose of guilty knowledge, it is competent to give in evidence other like instances of receiving, if they be not too remote. The buyer is required to exercise usual circumspection; so that, if a man in the defendant's position ought to have suspected, then the accused will be regarded as having suspected, as far as was necessary to put him on his guard.

(2) *As to goods bought in Virginia, but stolen elsewhere.*—If goods stolen in North Carolina are carried by the thief into Virginia, and bought here by one knowing of the theft, Mr. Minor says that while the American authorities differ, the weight of reason seem in favor of the view that it is not within the statute, because: (1) No cognizance, independently of statute, can be had of a crime committed outside of the State; (2) the thief himself, under such circumstances found in possession in Virginia, would not, at common law, be amenable to punishment in Virginia; (3) the receiver of a felon, where the crime was committed outside of the State is not amenable at common law to punishment in Virginia; and (4) in England they have a statute authorizing the punishment of parties under such circumstances, which would have been needless had the common law authorized it. (See section 9, above.)

(3) *Doctrine as to wife's receiving stolen goods.*—A wife cannot be convicted of receiving goods stolen by her

husband; nor if stolen by some one else, if her husband connive at her guilty reception, but it is otherwise if such reception is without his knowledge. Yet the husband may be convicted of receiving stolen goods which his wife has voluntarily stolen, or which she has received if he connive at her guilty reception.

(4) *Indictment for the offense under the statute.*—Our Supreme Court has held that an indictment under this statute, which makes the offense larceny, may be either in the form of an indictment for larceny, or it may set forth the specific facts which the statutes declares constitute the offense; and proof of the several requisite of the offense is necessary, and will sustain the indictment in either form.

(5) *Punishment for receiving stolen goods.*—The punishment is the same as for larceny—see section 1, above.

Would the offense under the statute be punished as grand or petit larceny, if the money or other property were stolen from the person of another, and of greater value than \$5 and of less than \$50? (H's G. & M., 194-6.)

§ 16. Form of "description" in warrant or indictment.—

No. 1. LARCENY OF GOODS IN GENERAL

(Code, § 4440.)

DESCRIPTION:

"ten bushels of wheat, (or other goods), of the value of ——— dollars, and one hundred pounds of tobacco, of the value of ——— dollars, of the goods and chattels of the said A. B., feloniously did steal, take, and carry away."

If the case be *petit larceny*, leave out the word "feloniously" in this and the following warrants, and insert in its stead, "unlawfully."

No. 2. STEALING, AT SAME TIME, TWO OR MORE ARTICLES BELONGING TO DIFFERENT PERSONS

(*Idem.*)

DESCRIPTION:

"one coat, of the value of ——— dollars, of the goods and chattels of the said A. B., and two pair of boots, of the value of ——— dollars, of the goods and chattels of one P. G., feloniously did steal, take, and carry away."

No. 3. STEALING A BANK NOTE OR BANK NOTES

(Idem; §§ 4442-3.)

DESCRIPTION:

"one bank note, for the payment of ——— dollars, and of the value of ——— dollars, then being the bank note and property of the said A. B., feloniously did steal, take, and carry away";

OR SECOND DESCRIPTION:

"divers, to-wit: four (or other number) bank notes, for the payment of divers sums of money, in the whole amounting to the sum of ——— dollars, and of the value of ——— dollars, then being the bank notes and property of the said A. B., feloniously did steal, take, and carry away."

If *more than one* bank note be stolen, use the "second description"; otherwise use the first "description."

No. 4. STEALING A BILL OF EXCHANGE, PROMISSORY NOTE, SINGLE BILL OR BOND

(Idem.)

DESCRIPTION:

"one bill of exchange, for the payment of ——— dollars, and of the value of ——— dollars, the said bill of exchange then being the property of the said A. B., and the said sum of ——— dollars, payable and secured by and upon the said bill of exchange, being then due and unsatisfied to the said A. B., the proprietor thereof, feloniously did steal, take, and carry away."

In case of a *promissory note, single bill, or bond*, leave out "bill of exchange" in the above form, and substitute therefor such writing as the case may be.

No. 5. STEALING COIN

DESCRIPTION:

"five (or other number) pieces of gold coin, current in this Commonwealth, called "eagles," and of the value of ten dollars each, of the moneys and coin of the said A. B., then and there feloniously did steal, take, and carry away."

No. 6. STEALING A HORSE MULE, ASS, COW, STEER, BULL, OR CALF

(Code, § 4440.)

DESCRIPTION:

"one horse (or *mule* or etc.) of the value of ——— dollars, the horse and property of the said A. B., feloniously did steal, take, and carry away."

No. 7. REMOVING, DESTROYING, RECEIVING, OR SECRETING GOODS DISTRAINED OR LEVIED ON

(Code, § 4447.)

DESCRIPTION:

"feloniously and fraudulently did remove (or *destroy, receive, or secrete*, as the case may be) one bay horse, of the value of ——— dollars, the horse and property of one P. G., a constable (or other officer) of said county, with intent to defeat a certain levy (or *distress*) made by the said constable on the said horse in favor of one D. S."

No. 8. STEALING THINGS ANNEXED TO THE FREEHOLD

(Code, § 4444.)

DESCRIPTION:

"did feloniously sever from the dwelling-house of him, the said A. B., a large quantity of lead, the property of the said A. B., of the value of ——— dollars, and the same then and there feloniously did steal, take, and carry away."

No. 9. STEALING FROM THE PERSON OF ANOTHER

Follow such one of the foregoing warrants as is suited to the thing stolen, and immediately before the word "feloniously," insert the phrase "from the person of him, the said A. B."

No. 10. FELONIOUSLY RECEIVING STOLEN GOODS

(Code § 4448.)

DESCRIPTION:

"feloniously did buy and receive one gold watch, of the value of ——— dollars, and one vest, of the value of ——— cents, of the goods and chattels of the said A. B., which said goods and chattels were lately before feloniously stolen, taken, and carried away from the said A. B., he the said C. D. then well knowing the said good and chattels to have been feloniously stolen, taken, and carried away."

If the case be a *misdemeanor*, omit "feloniously" in this and the following warrant, and in its stead insert "unlawfully."

No. 11. FELONIOUSLY RECEIVING A STOLEN BANK NOTE OR BANK NOTES
(*Idem.*)

DESCRIPTION:

"feloniously did buy and receive one bank note, for the payment of

—— dollars, and of the value of —— dollars, the bank note and property of the said A. B., which said bank note was lately before feloniously stolen, taken, and carried away from the said A. B., he the said C. D. then well knowing the said bank note to have been feloniously stolen, taken, and carried away."

OR SECOND DESCRIPTION:

"feloniously did buy and receive divers, to-wit: four (or other number) of bank notes, for the payment of divers sums of money, in the whole amounting to —— dollars, and of the value of —— dollars, the bank notes and property of the said A. B., which said bank notes were lately before feloniously stolen, taken, and carried away from the said A. B., he the said C. D. then well knowing the said bank notes to have been feloniously stolen, taken, and carried away."

If *more than one* bank note, use the "second description"; otherwise use the first "description."

LAUNDRIES, ETC.

For regulation and inspection of public laundries and wash houses, in reference to public health, see Code, § 1545. For an act limiting the recovery for loss of, or injury to, wearing apparel, clothes, or other articles in dyeing or laundering, see Acts 1920, p. 817.

LETTER OF CREDIT

See Bill of Exchange

- § 1. Definition and nature
- § 2. Forms of "Letters of Credit"

§ 1. Definition and nature.—A letter of credit is a letter from a merchant in one place directed to another in another place or country, requiring him, if a person therein named or the bearer shall have occasion to buy goods or to want money to any particular or unlimited amount, to either procure the same or pass his promise, bill or other engagement for it, the writer of the letter undertaking to provide him the money for the goods or to give him other satisfaction.

The letter may be directed to the writer's friends or correspondents or to some particular one of them. When the letter is presented to the person to whom it is addressed he either agrees to comply or refuses. If he refuse, the letter should be returned to the writer unless it is addressed to a merchant who is a debtor of the writer, in which case the person holding it should have it protested.

If the holder of the letter has paid the writer for it or has secured payment therefor to be made, the letter is similar to a bill of exchange (see *Bills of Exchange*). If given merely as an accommodation it amounts to a guaranty of payment of any advances made to the holder, or for any draft accepted or bill discounted for him by the party to whom the letter is addressed.

§ 2. Forms of "Letters of Credit."—

No. 1. HOME LETTER OF CREDIT

Norfolk, Va., ———, 192—.

——— BANK, NORFOLK, VA.,

GENTLEMEN:—Please honor the drafts of the bearer, Mr. ———, who is about to visit New York, to the extent of \$———, forwarding the checks as drawn, to the debit of this bank.

I am etc.

A. B.

To ——— Bank, New York.

No. 2. FOREIGN LETTER OF CREDIT, AND LETTER ADVISING OF THE GRANTING OF IT

Norfolk, Va., ———, 192—.

Messrs. A. & B., London.

GENTLEMEN.—We take pleasure in introducing to you Mr. Richard Roe, who is about to visit England and France, and desires us to open a credit for him with you for five hundred pounds sterling. You will please honor his drafts to an amount not exceeding in all the sum named, and charge the same to us, with advice.

Annexed, we send you the signature of Mr. Roe.

Respectfully yours,

Signature of

RICHARD ROE.

C. & D.

Norfolk, Va., May ———, 192—.

Messrs. A. & B., London.

GENTLEMEN.—We have this day granted a letter of credit on you (duplicate of which we enclose), for five hundred pounds sterling,

to Mr. Richard Roe. Mr. Roe is a man of about forty-five years of age, about five feet ten inches in height, dark complexion, and slightly marked by small-pox.

Respectfully yours,
C. & D.

LIBEL

(See "Burks' Pleading & Practice" (new ed.) title "Slander and Libel".)

See *Slander*

- § 1. Definition
- § 2. A civil injury and criminal offense
- § 3. What publication of a libel necessary
- § 4. The malice necessary for a libel
- § 5. What publications are lawful and privileged
 - (1) Where the publication is unintentional
 - (2) Where the publication was made in a *bona fide* discharge of a moral duty to society
- § 6. Truth of words and other defenses
- § 7. Damages
- § 8. Forms of "description" in warrant or indictment

§ 1. **Definition.**—A libel is a malicious defamation of any person, living or dead, made public by printing, writing, signs, or pictures, in order to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule. Thus, it is a libel to print of a person that he is a "swindler," or a "villain," or a "scoundrel"; that "he has the itch and stinks of brimstone"; to charge a man with gross misconduct and insulting females; or a counsellor with offering himself as a witness in order to divulge the secrets of his clients; or that a member of Congress is a "fawning sycophant, a misrepresentative in Congress, and a grovelling office-seeker"; to impute to a person the commission of a crime; to impute incapacity or dishonesty to a man in his trade or livelihood, as, for instance, to call a tradesman a bankrupt, a physician a quack, a lawyer a knave; or such other like defamatory matter. (H's G. & M., p. 360; 4 Min. Inst. 469.)

§ 2. **A civil injury and criminal offense.**—A libel is not only a civil injury for which an action may be maintained

under the common law, but was also a common law misdemeanor, and is now made a statutory offense—see *Slander*, section 6. But libel as a public offense differs from libel as a civil injury—in this: In the former the defendant cannot plead the truth of the charge by way of justification or bar to the prosecution, for the libel endangers the public peace, whether true or false, but he may by way of mitigating the punishment; also the offense is complete by sending the libel to the party defamed, no one else seeing it: whereas, in the latter case, truth is a sufficient answer to the libel, if it be alleged and proved (Code, § 6240); yet the libel must have been communicated to one or more strangers, who must have reasonably understood the words in the sense complained of. Directly tending as a libel does to a breach of the public peace, it is no wonder that the common sense of the common law should label it as a public injury, deserving public prosecution. (H's G. & M., p. 360; 17 Grat. 255; 4 Min. Inst., 469-70.)

By Acts 1922: "Any person who knowingly and wilfully states, delivers or transmits by any means whatever to any publisher, or employee of a publisher, of any newspaper, magazine, or other publication, any false and untrue statement concerning any person or corporation, with intent that the same shall be published, shall be guilty of a misdemeanor"—punishable by a fine not over \$500 or jail not over 12 months, or both (Code, § 4782).

The law as to slander applies in most particulars to libel as a civil injury—see *Slander*.

§ 3. What publication of a libel necessary.—Publication of the defamatory matter is necessary to libel—i. e., it must be made known to another, though it be only the party defamed, by delivery, reading, repeating, or the like, provided the person making the publication knows or might know the contents or character of the libel. The authority who writes, the printer who prints, the publisher of a journal in which it appears, the bookseller who sells, and, in short, all who are concerned in giving publicity to the defamation, are alike guilty of the offense as soon as publication thereof takes place. (H's G. & M., p. 361; 4 Min. Inst. 471.)

§ 4. The malice necessary for a libel.—Malice is essential to support a prosecution for libel, and whilst, in common acceptance, it signifies "ill-will against a person," yet in

its legal sense malice means "a wrongful act done intentionally without just cause or excuse"; and in libel it is presumed from the fact of publication, for in this, as in other cases, a man is always taken to intend the natural consequences of his own conduct. So that, if the publication, from considerations of public policy, be for a lawful purpose, and hence justified or excused, or if malice be otherwise negatived or disproved, the prosecution fails; but even in cases *prima facie* lawful, if malice be proved, as it may be, by the declarations and conduct of the party, or the notorious falsity of the publication, or the like, a prosecution may, nevertheless, be sustained. (H's G. & M., p. 361; 4 min. Inst. 475.)

§ 5. What publications are lawful and privileged.—From considerations of public policy publications are deemed lawful and exempt from public prosecution in the following instances:

(1) *Where the publication is unintentional*—e. g., where a writing is delivered without knowing its contents, or by mistake in good faith for another paper.

(2) *Where the publication was made in a bona fide discharge of a moral duty to society*—e. g., giving a character to a servant; making a confidential communication in good faith by or to a person interested; by way of admonition or advice, or in the confidence of friendship; for redress of supposed public abuses to persons having power to reform them; to afford the party disparaged an opportunity to exculpate himself; in the course of church discipline; warning in good faith against swindles; in promotion or assertion in good faith of a party's rights; and such like publications.

(3) *Certain literary criticisms*—e. g., fair, candid, and *bona fide* criticism or examination of any work of literature, science, or art, and of the qualifications, merits, or competency of the author.

(4) *Criticisms of public entertainments*—e. g., fair, candid, and *bona fide* comments on any places or species of public entertainment, or public performances.

(5) *Legislative or judicial proceedings*, but only statements of facts and proceedings, and not defamatory speeches of members or counsel, nor matter scandalous, blasphemous, or indecent; nor comments or conclusions of the publishers; nor in any case preliminary *ex parte* examination before a justice or a coroner.

(6) *Fair and honest criticisms on persons who hold, or who are candidates for, public office.*

The foregoing instances are *prima facie* lawful, but the presumption is rebutted if actual malice be proved.

(7) *Certain publications absolutely lawful*—e. g., where it occurs in the performance of a legal duty, which defendant is bound to perform, as a member of the legislature, judge, juror, witness, party in the cause, or the like—in all which cases the publication is unqualifiedly lawful, and the prosecution is totally barred, irrespective of malice, truth, or falsehood. (H's G. & M. p. 362; 4 Min. Inst. 472-4.)

§ 6. **Truth of words and other defenses.**—See *Slander*, sections 3 and 4, which apply equally to libel.

§ 7. **Damages.**—See *Slander*, section 5.

§ 8. **Forms of "description" in warrant or indictment.**—

NO. 1. LIBEL GENERALLY

(Code, § 4782.)

DESCRIPTION:

"a certain false, scandalous, and libelous writing falsely, maliciously, and scandalously did frame and make and caused to be written and published, of and concerning him the said A. B., the following words, signs, and figure, to-wit: [here insert the exact language]; which said writing the said C. D. did deliver, read, repeat, and publish to divers persons of this Commonwealth, with intent to bring into disrepute the good name, fame, credit and reputation of him the said A. B., and thereby to provoke him to a breach of the public peace, and to expose him to public hatred, contempt, and ridicule."

LIBRARIES

§ 1. **Virginia State library.**—See Code, §§ 348-72. For an act to allow public officials, State and local, to deposit records in the Virginia State Library, see Acts 1918, p. 409.

§ 2. **Law libraries for courts and bar.**—See Code, §§ 373-4.

§ 3. **Libraries in public schools.**—See Code, §§ 754-6.

§ 4. **Libraries established by city or town.**—See Code, § 3074.

LICENSE (ON LANDS)

See Easement

- § 1. Definition and nature
- § 2. Different kinds of license
- § 3. How license created
- § 4. Assignability of license
- § 5. Revocation of license

§ 1. **Definition and nature.**—A license is an authority conferred by the owner of land upon another to do an act or series of acts upon the former's land, the licensee possessing no estate or interest in the land itself, as, to hunt or fish upon another's land, or to flood it, or to cut timber or gather fruit thereon, or to go upon another's land under a ticket to witness a game, show, or other spectacle, etc.; or else a license is an authority conferred upon the owner of land on which one has an easement to do an act or series of acts upon the land in obstruction of the easement, as, where one entitled to an easement of light over another's land or entitled to flood it, gives authority to the land-owner to erect a structure on his own land obstructing the light or flow. In either case there is an implied authority or license to do whatever is necessary to the accomplishment of the acts, as, where, upon a license to hunt, the hunter may remove the game, or upon a license to cut trees, the licensee may enter and remove them. A licensee must act with due care and skill. (1 M's Real Prop., § 132.)

For difference between a license and an easement, see *Easement*, section 1.

§ 2. **Different kinds of license.**—They are: (1) Executory when the acts are yet to be performed; (2) executed, when the acts have already been performed; and (3) coupled with an interest, when, accompanying a grant of an easement, or other right to enter upon land for a particular purpose, or a grant of a building or other property upon such land, there is an express or implied authority or permission to act upon the land in a manner necessary for the complete operation of the grant, or complete enjoyment of the thing granted, as, where one is given the right to enter upon another's land to cut timber, his implied right to remove the timber is a license coupled with an interest, or where one places his chattels upon

another's land by his permission, or purchases chattels already upon the seller's land, his implied license to remove the chattels is a license coupled with an interest. (1 M's Real Prop., § 133.)

§ 3. How license created.—A license, not being an interest in land, need not be in writing, but may also be created orally, or it may be implied, no particular formality being necessary. (1 M's Real Prop., § 134.)

§ 4. Assignability of license.—Being a mere mutual personal trust and privilege, a license cannot ordinarily be assigned; but the servants or agents of the licensee may perform the acts whenever this was contemplated by the parties, or, where assistance is reasonably necessary, as, where a house is to be built or timber cut, or the like; and where a license is coupled with an interest, it is assignable with the interest. (1 M's Real Prop., § 135.)

§ 5. Revocation of license.—As a license is a mere mutual personal trust or privilege, it is revocable at the option of the licensor, and if he afterwards enters upon the land he is a trespasser; but if the revocation breaks a contract, the licensor is liable in damages, but he is not liable for damage caused to the licensee by the revocation, if no contract is violated; except where the transaction (being oral), if it were in writing under seal would create an easement, a court of equity, upon part performance, will regard it as an equitable easement, and therefore not revocable. A license may be revoked by a writing or orally; or by implication from the acts and conduct of the licensor, the essential question being has he intended to revoke, as, where he has transferred the land to a stranger, or by his death, unless the license be coupled with an interest. Licenses cannot be revoked: (1) Where the license is to do an act upon the licensee's own land, in obstruction of an easement therein, and the act is permanent, such as the erection of a building, which is actually performed; or (2) where the license is coupled with an interest (see section 2, above),—even death will not revoke such a license. (1 M's Real Prop., §§ 136-7.)

LICENSES AND LICENSE TAXES

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I. LICENSES IN GENERAL

§ 1. **How license obtained.**—Application is made to the commissioner of the revenue (or the treasurer, in practice) on a form furnished by him (or the treasurer), and upon payment to the treasurer of the license tax, which he certifies, the commissioner certifies he finds the application in due form and accompanied by the treasurer's certificate, and this constitutes the license. (Code, §§ 2360-1, 2372.)

If a court certificate is required, it may be given at the March or April court next preceeding May 1st, when the license takes effect; but if the license is not for a year, the court may grant the certificate, at the time, or before granting the license. (Code, § 2373.)

Where the Auditor is authorized to issue a license, the application and issue is similar to the above (Code, § 2362).

Where the commissioner of the revenue desires a license, the tax is paid to the treasurer, and the license is granted by the court, upon his application and the treasurer's receipt (Code, § 2363).

To ascertain the amount of the license tax, the commissioner must propound interrogatories or question on a form prescribed and furnished by the Auditor, to be answered on oath, and the commissioner certifies to the treasurer the amount of the license tax to be paid (Code, § 2366).

§ 2. When licenses expire.—All licenses expire April 30th, except to theatres, which and license to panoramas are for one week or less; to public shows, exhibitions or other performances, which are for 24 hours; and to bowling alleys and to billiard and bagatelle tables at watering places, which (and licenses to pool tables at watering places) end April 30th, or the expiration of 4 months, whichever happens first. (Code, § 2373.)

§ 3. License for less than a year; abatement of tax.—Where granted for less than a year, the tax is proportionately abated or reduced, unless otherwise provided, the year ending April 30th. (Code, § 2373.)

A license (where a court certificate is not required), the tax on which would be \$50 or more a year, may be issued for 3 months or less, to expire July, October, or January 31st, and the tax is proportionately less. (Code, § 2361.)

Licenses to bowling alleys, billiard tables or pool tables at watering places, if granted for 4 months or less, the tax is 50 per cent. of the annual tax. (Code, § 2373.)

§ 4. Increase or decrease of tax on merchant's license.—He pays on purchases. To ascertain any increase or decrease, the commissioner on January and July 1st, after he has made and returned semi-annually (July 1st and December 31st) to the clerk a fair classified list of all licenses granted the last six months, their duration, the business, amount of tax, data on which tax based, etc. (Code, § 2374), must lay before the local board of review the interrogatories taken on issuing the license (see section 1, above), with a list of the names and places of business of all merchants in his district (whether licensed or not), showing when the license begins and ends, amount of purchases on which based, and the tax paid. The board, with the commissioner and examiner of records present,

must immediately review the interrogatories and make such investigation and examination of the books, invoices, accounts, etc., of the merchant, or cause the examiner of records to do so (which also he may do on his account), as is necessary, to ascertain the full, complete, and correct purchases of the merchant. For this purpose the board may summon the merchant or other witness, who must (under penalty of \$10 to \$100) appear and testify on oath. The board reports to the commissioner, treasurer, and auditor. The commissioner notifies the merchants of the increase (which must be paid within 15 days under penalty of 20 per cent. to be added), and assesses the license tax thereon, on forms furnished by the auditor, and delivers it to the treasurer, who collects the additional tax from the merchant, and receipts him therefor, which receipted assessment is delivered to the merchant. When the purchases are decreased, the board delivers or mails a copy of its written order (showing the reason for its decision, the amount of decrease, and the amount of tax to be refunded) to the merchant and auditor; and the auditor is to refund the amount overpaid, upon the merchant's forwarding to him the order properly endorsed, unless the auditor thinks the board has erred, when he notifies the merchant and board his reasons therefor, and requests the board to re-hear the matter; and if the board refuses, or upon a re-hearing, its decision is against the Commonwealth, he may direct the Commonwealth's attorney to appeal to court, and if the court's decision is against the Commonwealth the auditor may appeal to the Court of Appeals. (Code, § 2361.) See, also, *Erroneous Assessments*.

§ 5. License to partnership or corporation.—The license must specify the individual members of the partnership (but not silent partners), and the name of the corporation stating whether domestic or foreign, and if foreign the authority to transact business here. Changing the firm name, or the membership of the firm, if any of the old members remain, does not terminate the license, even if they dissolve, and one or more old members remain, in which case the tax on purchases, sales, or profits is apportioned among them as may be just. (Code, §§ 2364-5, 2367.)

Separate licenses must be obtained by attorneys, dentists, and where the tax is estimated on the income, if a part is

exempt, the exemption applies to each member. A corporation engaged in more than one business must pay on each branch of the business. (Code, § 2368; Tax Bill, § 143.)

§ 6. Place of business; change of location.—The place of business must be designated in the license, else it is void. But if the party desires to move to another place, in the same county or city, the commissioner makes the alteration accordingly, notifying the commissioner of his new location. (Code, § 2379.)

§ 7. When double tax imposed and collected, and offender arrested.—Where one continues business without renewal of his license, or does business without a license, the commissioner is to assess a double tax, and at once deliver the assessment to the treasurer, who proceeds to collect by distress or otherwise; and if no sufficient property can be found, and the tax is not immediately paid, the treasurer shall arrest the offender and by his warrant commit him to jail until payment is made, or he gives bond with sufficient surety, in a penalty double the tax, to appear before the court to answer such action of debt, indictment, or information as may be brought against him, and to satisfy not only the fine imposed, but to pay the tax; and upon trial of such action, indictment or information the court may render judgment upon the bond for the fine and tax. (Code, § 2369.)

§ 8. Auditor may reform assessment of a license tax, or require new bond.—For good cause shown, he may do so; and where a bond is required, he may require a new bond, with additional security. (Code, § 2370.) See, also, *Erroneous Assessments*.

§ 9. License a personal privilege.—A license is a personal privilege to be exercised only by the one to whom granted, unless otherwise specially authorized. (Code, § 2376.)

§ 10. Assignment of license.—A license (other than to conduct a profession) may be assigned by the licensee or his administrator or executor; but where a court certificate or bond was required, a new certificate must be obtained or a new bond given. (Code, § 2377.)

§ 11. Revocation.—Upon motion of the Commonwealth's attorney or any person, after 10 days' notice, a license to sell something, granted upon a court certificate, the court may revoke it, at the licensee's cost, including \$5 for the

Commonwealth's attorney. (Code, § 560.) For revocation in particular cases, see *Attorney and Client*, and other particular heads.

§ 12. Fees of commissioner on licenses.—His fee is 75 cents, and 50 cents for a transfer, payable by the party. For the assessment of taxes on licenses, he is allowed (out of the treasury) one per cent. on the first \$5,000; one-half of one per cent. on the excess over \$5,000 and under \$10,000; and for the excess over \$10,000, one-fourth of one per cent. (Code, § 2383.)

§ 13. Other provisions as to license.—For to whom granted, see Code, § 2358; auditor may deduct from pay of commissioner for assessing less than legal tax—§§ 2371, 2373; commissioners to attend circuit court before May 1st and corporation court in March and April to issue licenses—§ 2373; when commissioners to return lists of licenses to auditor and clerks, etc.—§ 2374; lists of licenses to be evidence to charge collecting officer—§ 2375; each day's continuance in business without a license a separate offense—§ 2380; when taxes on licenses payable into the treasury—§ 2381; property used in licensed business not exempt from taxation—§ 2382; treasurers to report violation of duties by commissioners; pay withheld until report made—§ 2384.

§ 14. Penalty for doing business without license.—Any one engaging in or exercising a business, employment or profession without a license, if a license be required by law, or in any manner violating the license or revenue laws of the State, if no specific fine is imposed for such violation, shall be fined \$30 to \$1,000 for each offense. (Code, § 2393.)

Each day's continuance in business, etc., constitutes a separate offense. (Code, § 2380.)

II. LICENSE AND LICENSE TAXES ON PARTICULAR OCCUPATION

(From Tax Bill, etc., as found in 2 Code, 1919, pp. 3120-54, and Pollard's Biennial 1920, pp. 325-345, and Acts 1922, thus bringing the laws down to and including Acts 1922.)

§ 15. Merchants.—(1) *Definition.*—A merchant is one whose business is to buy and sell merchandise, and the term embraces all who habitually trade in merchandise (116 Va. 912).

(2) *License and tax.*—A license is required, under penalty of a fine of \$30 to \$1,000. The tax is graduated by the

amount of purchases, including things manufactured and offered for sale by him, but this section not applying to manufacturers taxed on capital (see sections 61, 62, below). On April 1st or within 10 days thereafter, he must report (on forms furnished by the commissioner) in writing, under oath, to the commissioner of the revenue, showing purchases, and also all merchandise manufactured and sold or offered for sale the preceding year. The tax on purchases not over \$1,000 is \$10; not over \$2,000, \$20; not over \$100,000, 20 cents per \$100 for excess over \$2,000; over \$100,000, 10 cents per \$100 for excess of \$100,000. He must also pay any registration fee and franchise tax (see *Corporations*, section 3, (8), and (9),) and local taxes and levies on the net amount of capital (not including real estate, and less the amount he owes on the goods) on hand February 1st.

Merchants are required to keep his invoices and a record in ink of all purchases, from which he makes his sworn report, and which the commissioner examines and from it verifies his report. For failure to keep such record, he must pay at least \$25 additional tax; and the commissioner must (under penalty of loss of his commission and a fine of \$25) report him to the local board of review, who ascertains his proper tax. If merchandise belonging to another is offered for sale by him or another at his store, he must take out a commission merchant's license.

The purchases of a beginner in business are the goods bought (and manufactured by him), and also an estimate of purchases he will make (and of goods manufactured by him) prior to March 31st.

If, at the end of the year, he desires to close out the remnant of stock, he pays thereon as for purchases. (Tax Bill, § 45 and § 46, as amended by Acts 1919, p. 149; see 246 U. S. 1; affirming 118 Va. 242; 122 Va. 178.)

(3) *Coal, wood, or ice merchants.*—These may peddle the same from vehicles without additional license or tax, except dealers in coal and wood in cities of 40,000 or more, must pay for such privilege an additional tax of \$50 for each wagon. (Id.)

(4) *Canvassers for lambs, pigs, calves, fowls, eggs, butter, etc.*—No license is required of one canvassing for lambs, pigs, calves, fowls, eggs, butter, and such like small matters

of subsistence designed as food for man; but any one keeping a place of business to sell "such articles in, or within a half mile of any city or town," must take out a merchant's license. (Id.)

(5) *Railroad or other corporation selling mineral or forest product, etc.*—A railroad or other corporation selling mineral or forest product, or any other article, is taxed like any other merchant dealing in like commodities; and this applies to companies keeping commissaries, or having agents for the sale of any other article than their own product; but a railroad company may buy and distribute to its employees, as a part of their compensation, meat, meal, or flour, at cost, without a license therefor, nor is a license required for selling the products of their own mines, lands, or manufactories, unless sold at a definite place of business apart from its mine, land or place of manufacture. Such corporation selling on account of the owner, and receiving a compensation other than for transportation, storage, or handling as provided for in its charter, must be licensed as a commission merchant. (Tax Bill, § 47; see 116 Va. 912; 118 Va. 242.)

§ 16. Merchant on train.—(1) *Definition.*—He is one engaged in the business of selling on railroad trains, newspapers, periodicals, magazines, candies, fruits, etc. (Tax Bill, § 46½.) His agent is called news-agent or "news-butcher."

(2) *License and tax.*—A license is required, under penalty of \$30 to \$1,000 (see section 14, above). The tax is 20 cents per mile of track. The party makes a sworn statement of the trackage, and delivers it to the commissioner of the revenue, who issues the license. Making a false statement as to trackage is fineable \$25 to \$500. (Tax Bill, § 46½.)

§ 17. Oyster packers.—A license is required of one engaged in the business of shucking or packing oysters, under penalty of \$30 to \$1,000, the amount of tax being based on the amount shucked or packed. The party on April 1st or within 10 days thereafter is to report under oath to the oyster inspector, on forms furnished him by the inspector, showing the amount actually shucked or packed the preceding year. The tax is, for not over 25,000 gallons, \$5; not over 50,000, \$10; not over 100,000, \$25; not over 200,000, \$50; over 200,000, \$100. This tax is in lieu of all

taxes for State purposes on the capital actually employed in the business (but not real estate). (Code, §§ 461½ (a), 461½ (b).)

§ 18. Commission merchant or broker.—See *Commission Merchant, or Factor*.

§ 19. Peddlers.—(1) *Definition; who not included.*—A peddler is one who carries from place to place any goods, wares, or merchandise, and offers to sell or barter the same or actually sells or barter the same; and he may sell any personal property a merchant may sell. All persons not keeping a regular place of business (whether it be a house or a vacant lot, or elsewhere), open at all times in regular business hours, and at the same place, and who offer for sale goods, wares, and merchandise, or who do not keep such a place of business, but who elsewhere, personally or through their agents, offer for sale or sell and at the same time delivers the goods, etc., are peddlers. This section applies to lightning rod peddlers; but not to peddlers of ice, wood, meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits, or other family supplies of a perishable nature grown or produced and not purchased by them; nor to a dairyman with one or more wagons in a city selling therefrom milk, butter, cream, and eggs; nor to peddlers of fish and oysters in the country or in unincorporated towns; nor to peddlers of melons from a car or cars in the country or in towns, not remaining over 24 hours at any one place; nor to peddlers of meat in the country; nor to a farmer peddling farm products, wood, or charcoal grown or produced by him. (Tax Bill, §§ 50, 51; see 103 Va. 857, 864; 113 Va. 562; 123 Va. 63. See, also itinerant venders or auctioneers, section 20, below.

(2) *License.*—A peddler is required to have a license, under penalty of \$50 to \$500 for each offense (see section 14, above), one-half to the informer. The license is for one county or city, and for one year, and is not transferable. He must exhibit his license on demand of any citizen; his failure to do so makes him subject to the penalties of peddling without a license. (Tax Bill, §§ 50, 51.) A vehicle used in peddling must have conspicuously displayed thereon the name of the peddler, with the street and number of his residence, if he resides in a city or town. (Tax Bill, § 51.)

(3) *Tax.*—The tax is \$250, when travelling on foot, and

\$500 in other cases; except the tax on peddlers of ice, wood, meat, milk, butter, eggs, poultry, fish, game, vegetables, fruits, or other family supplies of a perishable nature not grown or produced by them, is \$25 for each vehicle used; on peddler of pianos or organs, \$10 for each salesman selling from a wagon (and a city or town may require an additional tax, if its charter so authorizes); on peddlers of lightning rods, \$200; coal and wood peddlers in cities over 40,000, selling from vehicles, \$50 for each vehicle. (Tax Bill, § 51.)

§ 20. Itinerant venders and auctioneers.—

(1) *Definition; who not included.*—An itinerant vender or itinerant auctioneer is one (whether principal or agent), who engages in, does, or transacts any temporary or transient business, either in one locality, or in traveling from place to place, in the sale of goods, wares, and merchandise, and who for the purpose of carrying on such business, hires, leases, uses, or occupies any building or structure, tent, car, boat, or public room or any part thereof, including rooms in a hotel, lodging house, or house of private entertainment; or in any street, alley, or other public place in a city or town, or in a public road in a county, for the exhibition or sale of such goods, etc., and his temporary association with, or his conducting the business in connection with or as a part of the business and in the name of a local merchant, dealer, trader, or auctioneer, does not exempt him from this act. (Acts 1918, p. 490, § 9.)

But this act does not apply to venders of medicine, salves, liniments, etc., (see section 51, below); nor to peddlers (see section 19, above); nor to lightning rod merchants (see section 22, below); nor to a sale by an assignee, trustee, administrator, executor, or other fiduciary, or officer in bankruptcy, or other officer appointed by a court; nor to commercial travelers or selling agents of regularly established merchants or of manufacturers selling to the trade by sample for future delivery from their established place of business; nor to any person selling products raised upon lands leased or owned by him; nor to individuals handling vegetables, fruits, or other farm products; nor to hucksters on the streets; nor to a sale at auction of any wagon, carriage, automobile, mechanic's tools, used farming implements, live stock, poultry (dressed or undressed), sea food, vegetables, fruits, melons, berries, flow-

ers, leaf tobacco, used household furniture and effects at the residence of the housekeeper. (Acts 1918, p. 490, §§ 4, 11, 13, 14.)

(2) *License*.—A license is required of such vender or auctioneer, under a penalty of a fine of \$25 to \$500, or jail 6 months, or both. It is for not under one nor over 3 months, which may be renewed monthly, but not over 3 months. It is not transferable, and there is no abatement of tax. The license must be publicly exposed on his premises. Before issuing the license the commissioner must be satisfied that neither fraud nor deception of any kind is contemplated or will be practiced, and that neither the sale, the reasons therefor, nor the goods have not already been or will not thereafter be fraudulently or falsely advertised or in any wise whatsoever misrepresented. The sworn application for license must give the residence of the applicant, street and number of the proposed place of sale, the goods to be sold, and what statements or representations are to be made or advertised as to the same, and designate all the places where the same business has been conducted within the preceding 12 months, etc.

He shall not advertise, represent, or hold forth "any sale as an insurance, bankrupt, insolvent, assignee, trustee, estate, executor, administrator, receiver, wholesale, or manufacturer's or closing out sale, or as a sale of any goods damaged by smoke, fire, wreck, water or otherwise, or in any similar form," unless he first state under oath to the commissioner either in the original application for license or in a supplementary application subsequently filed and copied on the license, all the facts relating to the reasons and character of such special sale, including the names of the persons from whom the goods, etc., were obtained, date of delivery to him, and the place from which they were last taken, and all details necessary exactly to locate and fully identify the goods. A false statement or any violation hereof, makes him liable as for doing business without a license, and also to a fine of \$200, one-half to the informer.

He must not sell at auction between 7 p. m. and 8 a. m. during April 1st to September 30th; nor between 6 p. m. and 8 a. m. in the other months, any jewelry, diamonds, or other precious stone, watch, clock, gold and silverware, gold and silver plated ware, rugs, curtains, carpets, tapestries, statuary,

porcelains, china ware, pictures, paintings, bric-a-brac, or articles of *virtu* (of rare, curious, or beautiful quality).

He must be truthful, in making sales, as to the kind, quality, description of the goods, which statements shall be considered as warranties, and any breach of the same shall vitiate the sale, and subject the party making such false representation to a fine of \$25 to \$500, or jail 6 months, or both. (Acts 1918, p. 490, §§ 1, 2, 5 to 8, 12.)

(3) *Tax.*—The license tax on an itinerant vender or itinerant auctioneer, is \$200 per month or fraction thereof. This license and tax is not in lieu of the merchant's license on purchases, or county, city, or town license taxes or levies. But this act does not excuse or release any occupational or property tax, or any other tax imposed or levied by law. (Acts 1918, p. 490, §§ 2, 10.)

(4) *Act does not alter law as to fraudulent advertising, fraud, deceit, etc.*—See Acts 1918, p. 490, § 10.

(5) *Violation of act.*—Any violation of this act is punishable by a fine of \$25 to \$500, or jail 6 months, or both. (Acts 1918, p. 490, § 12.)

§ 21. Sellers of bottled mineral water.—A license is required, under penalty of a fine of \$30 to \$1,000 (see section 14, above). The tax is \$5, where gross sales are not over 5,000 gallons annually, and 10 cents per 100 on excess over 5,000. The dealer must keep proper books, which the commissioner may inspect; failure to do so, is fineable not under \$100, and a tax not under \$25. (Tax Bill, § 51½.) This section is from Act of 1919; the title says, “ * * * and to add thereto a new section to be known as § 51½;” is this sufficient under section 52 of the constitution?

§ 22. Lightning rod merchant.—He is one selling by sample in person or through agents taking orders and thereafter delivering the goods and erecting the same. A license is required, under penalty of a fine of \$50 to \$500. The State tax is \$25 per year, and not abateable for less time, and \$10 for a county or city license. (Tax Bill, § 51 (a).) For peddlers, see section 19, (3), above.

§ 23. Patent rights seller.—One not the patentee must have a license to sell or barter patent rights, which if authenticated by the clerks of court of the other counties and cities certifying the authority and signature of the commis-

sioner, may be used throughout the State. A separate license is required for each thing patented. A person owning a State right, may sell anywhere through agents furnished with a copy of the license. The tax, if the party is a citizen, is \$25. The license does not authorize a sale of the thing patented. (Tax Bill. §§ 52, 53.)

§ 24. Real estate or land agent.—See *Real Estate Agent or Broker*.

§ 25. Book agents.—A book agent is one (not a licensed merchant) who receives subscriptions for, or in any manner, furnish books, maps, prints, pamphlets, or periodicals. A license is required, under penalty of \$50 to \$100. The tax is \$10. But one desiring to distribute religious books, etc., applies to the judge, who, if satisfied of his good character and that he is a proper person for the purpose, directs the commissioner to issue him a license free of tax. (Tax Bill, §§ 56, 57.) See, also *Interstate Commerce*.

§ 26. Auctioneers and Common Criers.—See *Auction and Auctioneers*.

§ 27. Retail tobacco dealer.—A person not a producer, must under a penalty of \$30 to \$1,000 fine (see section 14, above), have a license to sell by retail, tobacco, snuff and cigars. The specific tax is \$5; and he must also pay on purchases as a merchant (see section 15, (2), above). But a hotel keeper or keeper of a house of private entertainment or eating house, whose annual purchases are less than \$500, need not also to take out a merchant's license, unless he is also conducting a mercantile business. (Tax Bill, § 68.)

§ 28. Junk dealers, canvassers, etc.—(1) *Definition.*—A junk dealer is one who purchases, sells, barter, or exchanges, any kind of second-hand articles, junk, rags, rag cullings, bones, bottles, *puer* (the dung of dogs), scrap metals, metal drosses, steel, iron, paper, old lead pipe, old bathroom fixtures, old rubber, old rubber articles, and other like commodities, except furniture, clothes, shoes, and stoves intended to be re-sold for use as such. (Tax Bill, § 69.)

(2) *License and duties.*—This is granted by the court upon satisfactory evidence of his good character to carry on the business, and must specify the premises. To do business without a license, or to change the place of business without the consent of the court, is fineable \$50 for each day. The

place must be kept open for purchase or sale, or inspection of any revenue or police officer. The purchases must be made between sunrise and sunset. He must place over his principal entrance a sign designating that he is a licensed junk dealer. This section does not prevent one keeping or operating a foundry or machine shop from exchanging his new castings for old ones, or from buying old metals or old machines for use in his business, or to be renovated and sold, but such person cannot buy those things and sell them again in the same condition they were when purchased, nor does this section prevent any regularly licensed merchant in the country or in towns of 2,000 or less (who is subject to like inspection as a junk dealer), from buying or trading for rags, old iron, or other articles or junk, unless there be a regularly licensed junk dealer within 3 miles of his place of business. Every junk dealer and every such foundryman and merchant, must keep at his place of business a book of all his daily transactions (except as to rags, bones, old iron, and paper), describing the goods purchased, the time of receiving the same, name and residence of the seller or delivery, terms and conditions of purchase, or receipt thereof, and all other facts respecting the transaction; which book shall at all times be subject to the inspection of the judges of the criminal courts, chief of police, captains and sergeants of the police, sergeant or sheriff, or other officer with police jurisdiction, and such junk dealer, foundryman, or merchant must admit to his premises at any time any such officer, to examine books or records or articles purchased or received, and to search for and take any article known by him to be missing, or known or believed by him to be stolen, without a search warrant or other process. (Tax Bill, § 69.) See also, Code, § 4711, prescribing penalties.

(3) *Canvassers*.—Canvassers for the above articles for a junk dealer or for sale to him or any other person, must be authorized in writing by some junk dealer, who must take out in his name a license for each canvasser he appoints, who is furnished with 2 tin signs, "Licensed Junk Canvasser No.—", one to be fixed on each side of his wagon. Canvassers may canvass anywhere in the State. (Tax Bill, § 69.)

(4) *Penalties*.—A violation of the provisions of this section is punishable by a fine of \$50 to \$100 for each offense. And a junk dealer is liable whether the violation is by himself or by his agent, clerk, or employee. (Tax Bill, § 69.)

(5) *Tax*.—A junk dealer's license tax is \$50, and \$25 for doing business at other premises, and \$30 for each canvasser, and he also pays the cost of the tin signs. (Tax Bill, § 70.)

§ 29. *Merchandise broker, stock broker, broker in futures, ship-broker, and insurance broker*.—See *Brokers*.

§ 30. *Pawnbrokers*.—(1) *Definition*.—A pawnbroker is one who in any manner lends or advances money or other thing for profit on the pledge and possession of personal property, or other valuable things other than securities or written or printed evidences of indebtedness, or who deals in the purchasing of personal property or other valuable thing on condition of selling the same back to the seller at a stipulated price. (Tax Bill, § 79.)

(2) *License and bond, and accounts*.—He must obtain a license, under penalty of a fine of \$50 to \$500. License is issued by the court, upon satisfactory evidence of good character to carry on such business in the county or city, and must designate the building, and the business must not be carried on in any other building, except by the court's consent, under penalty of \$50 for each day.

He must also give a bond, with two sufficient sureties, for \$2,500, to observe and keep the law, on which a customer may sue by leave of court, if an execution against the pawnbroker is returned not satisfied. (Tax Bill, § 79.)

(3) *Tax*.—His license tax is \$250. (Tax Bill, § 80.)

(4) *Book of transactions*.—He must keep a book of daily entries, giving a description of the articles pawned or pledged, the amount loaned, rate of interest, name and residence of the customer (giving him a memorandum thereof), the time of receiving the article, the terms and conditions of the loan including the period for which made, and all other facts and circumstances respecting such loan, with a particular description of the complexion, color of eyes and hair, height and general appearance of the customer.

(5) *Book and premises open to inspection*.—The pawnbroker's books, pawns, and records must be open to inspection, at all reasonable times, of the judges of the criminal courts, chief of police, and captains and sergeants of the city, town, or county police, sergeant and sheriff, or other officer with police jurisdiction, who may search for and take into possession any article known by him to be missing, or known or

believed by him to have been stolen, without a search warrant or other process. (Tax Bill, § 79.)

(6) *Interest.*—A pawnbroker must not ask or receive greater interest than 10 per cent. per month on \$25 or less; 5 per cent. per month on over \$25 and under \$100; 3 per cent. per month on \$100 or more, secured by a pledge of tangible personal property. And no loan must be divided to increase the rate of interest. On blankets, clothing, carpets, furs, rugs, dress goods, clothes, mirrors, oil paintings, glass and china ware, pianos, organs, curtains, beddings, and upholstered furniture, an extra charge of 2 per cent. per month for the first 3 months or less, to cover storing or taking care of such goods. (Tax Bill, § 79.)

(7) *Sale.*—No sale shall be made within 4 months, except by consent in writing of the pawner. Sales must be by public auction, by auctioneers designated and approved by the court. Notice of time and place of sale, name of auctioneer, and description of article must published at least 5 days in a daily newspaper of general circulation, in the place, or if none published there, in a newspaper published in an adjoining county. Any surplus, after payment of loan and interest, and expenses of advertisement of sale, is to be paid to the pawner. (Tax Bill, § 79.)

(8) *Pawns not to be changed or concealed.*—Pawns must not be disfigured or their identity destroyed or affected in any manner whatsoever while with the pawnbroker, nor must they be in any manner concealed for 48 hours after they have been received. (Tax Bill, § 79.)

(9) *Penalties.*—For a pawnbroker to violate or neglect or refuse to comply with any provision of this act, other than doing business without a license (see (2), above), he is fined not over \$100. He is liable, whether such violation be by himself or by his agent, clerk, or employee. Every person convicted of violating any of the provisions of this section, shall (except where a different penalty is prescribed) be fined not over \$25, and for a subsequent offense, pay such penalty as the court may impose, and shall, in discretion of the court, forfeit his license. (Tax Bill, § 79.)

The last two and the 8th from the last paragraphs of the act fixing the penalty, seem to be conflicting.

§ 31. Building and loan associations.—Such association

must obtain a license, under penalty of a fine of \$50 to \$500. The specific State license tax, if capital paid in is not over \$25,000, is \$75; if over \$25,000, \$3 per \$1,000 for the excess; and a non-resident association must also pay the same tax; and no additional State tax is to be imposed on paid in capital, and the city or town tax cannot be greater. An association on the purely mutual plan and making loans only to stockholders, and confining its business solely to the county or city where organized and immediately adjoining counties and cities, pays a license tax of only \$50. The association must on April 1st or within 10 days thereafter, of each year, report to the commissioner of the revenue its capital paid in or invested in this State. The shares of stock are not taxable in the hands of the holder. (Tax Bill, § 82.) See, also, *Building & Loan and Industrial Loan Associations*.

§ 32. Mercantile and collection agencies.—License is required of mercantile agencies, under penalty of \$100 to \$500; tax, \$250 on each agency, paid annually to auditor. (Tax Bill, §§ 85, 86.) A collection agency is the business of collecting for others all kinds of claims, including notes, drafts and other negotiable instruments. Such agency whose commissions amount to \$1,000 annually must be licensed, under penalty of a fine of \$100 to \$500; and the tax is \$25. But this does not apply to attorneys at law (Tax Bill, § 86½).

§ 33. Undertakers.—A license is required, under penalty of \$10 to \$25. Tax, in the country and towns not over 1,000 inhabitants, \$5; not over 3,000, \$10; not over 5,000, \$15; in cities not over 10,000, \$25; not over 30,000, \$35; over 30,000, \$50. (Tax Bill, §§ 87, 88.)

§ 34. Civil, mining, mechanical or electrical engineer.—A license is required under penalty of a fine of \$20 to \$30. The tax (for whole State) is \$15; but if he has not practiced over 5 years, or his income the last year is under \$500, the tax is \$5. (Tax Bill, § 89.)

This section does not apply where one is in the exclusive employment of another, and so not engaged in his own business (122 Va. 906).

For an act "to provide for the examination and certification of professional engineers, architects and land surveyors, and to regulate the practice of engineering, architecture, and land surveying; to establish their relation to public works and the surveying and platting of land", see Acts 1920, p. 496.

§ 35. Contractors.—(1) *Definition.*—A contractor is one who accepts orders or contracts for doing any work on or in any building or structure, or to do any paving or curbing on sidewalks or streets, public or private property; or to excavate for foundations or any other purposes; or to construct any sewer. (Tax Bill, § 90.)

(2) *License and tax.*—A State license is required, under penalty of a fine of \$30 to \$100. The State tax for doing business anywhere in the State, is as follows: No tax where gross orders or contracts do not amount to \$5,000 annually; if gross orders or contracts accepted are \$5,000 (perhaps it was intended to say “not” over \$5,000), \$5; not over \$10,000, \$10; not over \$20,000, \$15; not over \$50,000, \$20; not over \$100,000, \$50; not over \$150,000, \$100; over \$150,000, \$150; if he has paid less than the maximum tax, he must not accept contracts above the maximum amount, unless he pays the additional tax. (Tax Bill, §§ 90, 91; see 120 Va. 524.)

§ 36. Architects.—One who, for compensation, draws or furnishes plans for the construction of any building or other structure, is an architect, and must obtain a license, under penalty of a fine of \$10 to \$30. The tax for doing business anywhere in the State, is \$25, but if his income last year was less than \$500, it is \$10. (Tax Bill, § 92.) See, also, at end of section 34, above, and *Architect and Builder*.

§ 37. Hotels.—See *Hotels*.

§ 38. Houses of private entertainment and eating houses.—See *Boarding and Eating Houses*.

§ 39. Bowling saloon.—This is a saloon for the reception of company to play at bowls, and the keeper must have a license, under penalty of \$50 to \$150 fine. The tax is \$25, and \$10 for each alley over one. (Tax Bill, §§ 98, 99; see sections 2 and 3, above.)

Furniture may also be taxed. (Tax Bill, § 104.)

§ 40. Billiard room.—This is a saloon wherein there is a table at which billiards or pool is played. The keeper must have a license, under penalty of \$50 to \$100 fine. The tax on a billiard or pool room is \$50, and \$25 for each table over one; if at a watering place and is for 4 months or less, or if in the country, or a town under 1,000 inhabitants, the tax is \$25; and \$12.50 for each table over one. (Tax Bill, §§ 100-1; see sections 2 and 3, above.) Furniture may also be taxed. (Tax Bill, § 104.)

§ 41. Bagatelle saloon.—This is a saloon or other public room wherein is a table at which to play at bagatelle, whether a charge is made or not; and the keeper must have a license, under penalty of \$50 to \$100 fine. The tax is \$10, and \$5 for each table over one. (Tax Bill, §§ 102-3; see sections 2 and 3, above.) Furniture may also be taxed. (Tax Bill, § 104.)

§ 42. Theatres, public performances, exhibitions, etc.—A license for each performance is required, under penalty of \$50 to \$500, to exhibit for compensation any theatrical performance (and all engaged are liable, if there be no license, and the license may be for a week), or performance similar thereto, panorama (the license may be for a week), or any public performance or exhibition of any kind, lectures, literary readings, and performances, except for benevolent, charitable, or educational purposes. The tax is \$5 for each performance, or \$15 per week; but in towns under 4,000 inhabitants, \$2 each or \$6 per week. This does not apply to football, baseball, basketball, or kindred games. (Tax Bill, §§ 105-6.) A panoramic reproduction of the Boer War with scenery, etc., without circus rings, trapeze acting, clowns, or menagerie, is under this and not section 109 of the Tax Bill (107 Va. 653).

§ 43. Moving picture machines, phonographs, etc.—A license is required, under penalty of \$30 to \$1,000 (see section 14, above), for the exhibition of any automatic moving picture machine, phonograph, graphophone, or similar musical machine, except for benevolent, charitable or educational purposes. The tax, where the admission is not over 30 cents and seating capacity not over 350, in cities over 20,000 inhabitants, is \$15 per week or less, or \$90 for a year; if seating capacity exceeds 350, \$2 per 10 seats or fraction thereof in excess; in towns or cities over 4,000 and under 20,000, \$10 per week or less, or \$60 for a year, and for additional seating capacity over 350, \$1 per 10 seats or fraction thereof; in towns of 1,000 to 4,000, \$3 per week or less, or \$25 for a year, and for additional seating capacity over 350, 50 cents for 10 seats or fraction thereof; in towns under 1,000, and in the country, as the only State tax, \$1 per day, or \$2.50 per week, or \$10 for a year. If the exhibition is for benevolent, charitable, or educational purposes for longer than one day and the exhibitor receives a part of the receipts he is subject to the tax above, except as to the first day. (Tax Bill, § 106½.)

§ 44. Circus, menagerie, carnival, show, etc.—

(1) *License*.—One exhibiting performances in a side-show, dog and pony (or either) show, trained animal show, circus, menagerie and circus, or any other show, exhibition or performance similar thereto, must under penalty of a fine of \$50 to \$500, obtain a license; but this does not apply to a resident mechanic or artist exhibiting the production of his own art or invention without compensation; nor to an agricultural fair or the shows exhibited within the grounds of and during such fair, whether an admission be charged or not; nor to residents performing in a show or exhibition for charity or other benevolent purposes; nor to those engaged or acting in such show, exhibition, or performance. But giving performances by one who makes it a business to do so, under a contract with or under the auspices of some benevolent or charitable body, does not exempt from the license and tax.

Every show, exhibition, or performance, whether under the same canvas or not, must have a separate license, whether exhibited for compensation or not. The police authorities must not allow any such performance to open until the license is exhibited to them. (Tax Bill, § 107, as amended by Acts 1920, p. 490, and § 108.)

(2) *Tax on circus, menagerie, carnival, show, etc.*—

(a) In the country or towns not over 3,000 inhabitants, for each day's performance or exhibition of a carnival (or other like show), \$25; a side (or like) show, \$5; on a dog and pony (or either or like) show, \$15; a trained animal (or like) show, or wild west (or like) show, \$25; circus or circus and menagerie, \$150.

(b) In a town or city from 3,000 to 10,000 (or within 5 miles thereof), for each day's performance or exhibition of a side (or like) show, \$10; carnival (or other like show), \$75; on a dog and pony (or either, or the like) show, \$25; a trained animal (or like) show, or wild west (or like) show, \$50; circus or circus and menagerie (or like show), \$200.

(c) In a city over 10,000 and not over 60,000, or within 5 miles thereof, for each day's performance or exhibition of a carnival (or other like show), \$150; a side (or like) show, \$15; on a dog and pony (or either, or like) show, \$40; on a trained animal (or like) show, or a wild west (or like) show, \$75; on a circus or circus and menagerie (or like show), for each day or part of day, \$250.

In a city over 60,000, or within 5 miles thereof, for each day's exhibition or performance of a carnival (or other like show, \$150; on a side (or like) show, \$25; on a dog and pony (or either, or like) show, \$60; on a trained animal (or like) show, or wild west (or like) show, \$100; on a circus, or a circus and menagerie (or like) show, for each day or part day, \$500.

Under this section, "a carnival shall mean an aggregation of shows, amusements, concessions, eating places and riding devices, or any of them operating together on one lot or street, or on contiguous lots or streets, moving from place to place, whether the same are owned and actually operated by separate persons, firms, corporations, or individuals, or not. (Tax Bill, § 109, as amended by Acts 1922. See note under sec. 42.)

(3) *Tax on circuses, carnivals, etc., held during fairs.*—A traveling circus, carnival or shows giving performances in the open air or tents outside the fair grounds, for one week prior to or during the week of, or one week after, the time of holding a regular or annual fair, must pay a State license tax of \$1,000 for each performance in addition to the tax under (2), above; and advertising such circus, carnival or show, within 30 days prior to such fair, is forbidden under penalty of a fine of \$2,000. This section does not apply to shows, etc., within the fair grounds. (Tax Bill, § 109½.)

§ 45. Hobby-horse machines, merry-go-round, etc.—A license is required under penalty of \$20 to \$50, on a hobby-horse machine, merry-go-round, ocean wave, ferris wheel, or other like machines, on which charges are made for riding, whether run by hand, horse, steam, electric, or other power. The tax is \$10 per each county and city where operated. (Tax Bill, §§ 110-11.)

§ 46. Parks for public amusement.—The owners and operators of permanent parks for public amusement, open at least 4 months continuously each day (Sundays and holidays excepted) during the year, may operate any or all of the following: "a bowling alley, trained animal show, hobby-horse or merry-go-round, ferris wheel, penny or nickel machine for exhibiting pictures, moving picture show, theatrical performance, old mill, or similar entertainments, and at which may be kept and operated any game or wheel where the prize consists of fruit, candy, toys or other novelties, upon the payment of a license tax of \$400 for 4 months; \$600 for 8 months, and

\$800 for one year," but the operation of "a carnival or circus or show of any kind which moves from place to place shall not be allowed under the license provided for in this section." (Tax Bill, § 111½, as amended by Acts 1922.)

§ 47. Public rooms and skating rinks.—A proprietor or occupier of a public theater, or other room or rooms for a theatrical performance, lecture, concert, or other exhibitions, for the use of which a charge is made, or compensation in any manner received, must, under penalty of a fine of \$50 to \$100; if in a town of 2,000 or more inhabitants, obtain a license. The tax is \$20; and one who establishes, keeps, or exhibits for profit a skating rink, in a city of over 10,000 inhabitants, must pay \$10 per quarter; if in a city or town of 2,000 to 10,000, \$7.50 per quarter; if anywhere else, \$5 per quarter; and where the house or rooms are used for both purposes, both taxes must be paid. And the house and furniture are taxed also as property. (Tax Bill, §§ 112-13, 104.)

§ 48. Soft drinks.—To sell soft drinks from a soda fountain, including all drinks for which a liquor license is not required, a license must, under penalty of \$30 to \$1,000 (see section 14, above), be obtained.

In towns and cities of over 5,000 inhabitants, the annual State tax is \$10 for each fountain; elsewhere \$5, and for the privilege of manufacturing soft drinks to be sold by wholesale or for bottling soft drinks, or for wholesale, or for wholesale houses selling soft drinks by wholesale where no tax is paid in this State by the manufacturer or bottler, the minimum annual license tax \$22.50, and 10 cents per \$100 of the gross sales (not including carriers and bottles) over \$10,000 annually. A manufacturer must keep a special book of sales, which the commissioner must inspect in making the license assessment; failing to keep such book, he is assessed a minimum tax of \$300, and the commissioner reports his failure to the local board of review, who summons such manufacturer, wholesaler, or bottler before them and ascertain the correct tax over \$300. For such failure and his failure or refusal to give information as to his sales, the party is fined not over \$500, for which purpose the matter is reported to the Commonwealth's Attorney for indictment and prosecution. (Tax Bill, § 113½, as amended by Acts 1919, p. 152.) See, also, *Intoxicating Liquors*, sections 52, 53, 54.

§ 49. Attorneys, physicians, and dentists.—(1) *Attorneys*.—In addition to being licensed by the Board of Bar Examiners, they must also obtain, under penalty of a fine of \$50 to \$100 for each offense, a revenue license. The annual tax to practice throughout the State, where licensed under 5 years, or whose annual receipts are under \$500, is \$15; otherwise, \$25. (Tax Bill, §§ 114-16.) Must a lawyer be licensed, though he is entirely employed by another?—see 122 Va. 906.

(2) *Physicians and surgeons*.—Before applying for a revenue license, to practice as a physician or surgeon, he must first have passed an examination before the State Board of Medical Examiners, or have a special permit from the president of the board, or file with the commissioner of the revenue an affidavit that he commenced the practice prior to January 1, 1885. (Tax Bill, § 114.)

There seems to be no license tax on physicians and surgeons, probably because they do so much charity practice, etc.

For the statutes regulating the practice of medicine, see Code, §§ 1608-39, and Acts 1920, pp. 247, 11, amending §§ 1615, 1636, respectively; and Acts 1918, p. 361 (defining and regulating the practice of poropathy), and Acts 1918, p. 771 (for the prevention of blindness from ophthalmia neonatorum, etc.) and Acts 1918, p. 56 (prohibiting advertisements concerning venereal diseases).

(3) *Dentists*.—Before applying for a revenue license to practice as a dentist, he must first have passed an examination before the State Board of Dental Examiners, or have a special permit from the president of the board, or have had a license to practice January 28, 1890, and have complied with the law as to registry of dentists.

A dentist, to practice for compensation, must, under a penalty of a fine of \$30 to \$100 for each offense, and being barred from recovering compensation therefor, obtain a revenue license. The annual tax to practice anywhere in the State, if he has been licensed not more than 5 years, is \$10; if over 5 years, \$15; in towns and cities of 5,000 or more inhabitants, \$25; but a dentist whose annual receipts are under \$500, pays only \$10.

This section does not prevent any authorized physician or surgeon or other person from extracting teeth from one with toothache. (Tax Bill, §§ 114, 117-18).

For the statutes regulating the practice of dentistry, see Code, §§ 1640-54, and Acts 1920, p. 233, amending § 1646.

§ 50. Veterinary surgeons.—To practice as such, for compensation, he must, under penalty of \$25 to \$50 fine, obtain a license. The tax is \$10; but this section does not apply to persons who confine their practice to castration, spaying, or dehorning of live stock. (Tax Bill, § 118-a.)

§ 51. Venders of medicines, salves, liniments, etc.—One (other than a licensed merchant at his regular place of business) who sells any patent, proprietary, or domestic medicines, salve, liniment, or compounds of like kind, or any spices, or extracts, toilet articles or other articles of like kind, whether he be the manufacturer thereof or not, must, under penalty of a fine of \$30 to \$100, obtain a license. The tax is \$125 for each wagon used. (Tax Bill, §§ 119-20.) For an act as to itinerant venders which expressly exempts the things of this section, see section 20, above.

§ 52. Daguerrian and photograph artists and their agents.—One who takes or exposes on plates, films, or sensitized material, or who develops or prints images of objects according to the invention of the daguerreotype process, or who does any or all of these things by whatever name it may be known or called, is a daguerreotype artist, and one who canvasses for, or acts as the agent of, a daguerrean artist or photographer, in transmitting pictures, daguerreotypes or photographs, to other points for the purpose of having them copied or enlarged, or colored, is a daguerrean artist's agent or canvasser, and he is so whether he acts for himself or another, and such agent or canvasser (though nothing is said about the artist himself, unless he be the canvasser) must, under penalty of a fine of \$50 to \$500, obtain a license, and pay a tax, in the country, or in a town under 200 inhabitants, of \$10; in a town or city of 2,000 to 10,000, \$30; in a city of 10,000 to 20,000, \$40; in a city over 20,000, \$50; and an additional \$5 for each county or city in which he operates other than that in which he has his regular place of business. This act does not apply to amateur photographers who expose, develop and finish their work, and do not part with same for compensation, and do not receive any compensation for performing any of the processes herein set forth. (Tax Bill, §§ 121-2.)

Agents soliciting for a person or concern out of this State cannot be taxed under this section, as that would be taxing interstate commerce, which Congress alone can do; but if the customer agrees to buy a frame when the picture is delivered, he must have a peddler's license for that, the negotiations being wholly within the State—(see Report Attorney-General Anderson 1908, p. 76; 110 Va. 235 (affirmed by U. S. Supreme Court); 113 Va. 562.)

§ 53. Stallions and Jackasses.—The owner of a stallion or jackass, letting to mares, other than his own, for compensation, must, under penalty of a fine of \$30 to \$50, obtain a license for the county or corporation. The annual tax is \$10. (Tax Bill, §§ 123-4.) For lien on colt, see *Liens of Mechanics and Others*, section 24.

§ 54. Bulls.—The owner of a bull or bulls, letting to cows other than his own, (nothing said about compensation), must, under penalty of \$30 to \$1,000 (see section 14, above), obtain a special license, and pay a tax of \$2.50 on each bull. He has a lien on the calf until 6 months old, for the charge. (Tax Bill, § 125.) For further as to the lien, see *Liens of Mechanics and Others*, section 24.

§ 55. Agents for renting houses.—One engaged in renting houses, farms, or other real estate for compensation or profit is an agent for renting houses (who may also rent any real estate), and must, under penalty of a fine of \$50 to \$100, obtain a license. The tax, in cities over 5,000 inhabitants is \$30; in other cases, \$10. But administrators, executors, guardians, and other fiduciaries are exempt from this section. (Tax Bill, §§ 126-7.)

§ 56. Labor agents.—A labor agent is one who solicits, hires, or contracts with, laborers, male or female, to be employed by others, or an agent of his (except those doing all their business at their office, as stated below); and he must, under penalty of a fine of \$100 to \$500, obtain a license. The application must first produce a court certificate that he is a person of good character and honest demeanor. The annual tax is \$500; except that labor agents in cities and towns who keep there a regular office, where all their business is transacted, and who do not in person or by agent solicit, hire, or contract with laborers outside of such office, or attempt so to

do, except by a written or telegraphic or telephonic communication, pay only \$25, and all their employees and agents in such office, work under their employer's license. (Tax Bill, §§ 128-9.) This section does not prohibit one or his agent, needing men for his own work, from hiring them without a license (123 Va. 420; see also 24 Va. 805).

§ 57. Laundries.—For conducting the business of a laundry, a license is required under penalty of a fine of \$10 to \$50. The tax, if operated other than by hand, in the country, or in a town of not over 2,000 inhabitants, is \$5; in a town or city of 2,000 to 5,000, \$10; over 5,000, \$25; if a hand laundry, in the country or a town not over 2,000, \$2.50; in a town or city of 2,000 to 5,000, \$5; over 5,000, \$10. This does not apply to persons who wash bed-clothing, wearing apparel, etc., without laundry machinery, and who do not keep shops or other regular places of business for the purpose. (Tax Bill, § 130.)

§ 58. Storage and impounding.—One who keeps for compensation a house, yard, lot, or wagon yard, for storage or impounding any produce, wares or merchandise, including wood, coal, lumber, guano, marl, or other commodities, or any live stock, or makes demand, or receives in any manner, compensation for storage or impounding, must, under penalty of a fine of \$50 to \$500, obtain a license. The tax on every house, is \$25; except in a city of over 30,000 inhabitants, it is \$50; on every yard, wagon yard, or lot, \$10; but no tax is charged where the compensation is under \$50 annually. (Tax Bill, §§ 131-2.)

§ 59. Livery stables.—The keeper of a stable or stalls in which horses are kept at livery or fed, or at which horses and vehicles are hired for compensation, must, under penalty of a fine of \$30 to \$100, obtain a license, except in case of a licensed house of private entertainment, where horses of travelers or guests stopping there are fed. The tax, in the country or in a town under 2,000 inhabitants, is \$15, and 50 cents for each stall over 25; in a town or city over 2,000, \$25 and 50 cents for each stall; at water places or summer resort, for months or less, half price.

For running a single hack, carriage, cab, or other vehicle for carrying passengers for hire, \$10, except solely in the country or a town over 1,000, \$2.50.

For a feed stable for boarding horses for compensation, in the country or a town under 2,000, \$5; in a town or city 2,000 or more, \$10.

For running a conveyance of any kind for transfer of baggage, freight, furniture, or other articles of merchandise, in a town or city of 2,000 or more, \$2.50 for each one-horse conveyance, and \$5 for each conveyance of two horses or more. (Tax Bill, §§ 133-4.)

§ 60. Sewing machines and accessories.—

(1) *Canvassers to have license.*—A manufacturer or other person, whether a licensed peddler, merchant or sample merchant, or not, who canvasses a county, town, or city, to sell sewing machines and accessories, must be licensed.

(2) *Manufacturer selling throughout the State.*—He gets a license from the auditor, for which he pays \$200, which is in lieu of any additional State, county, city, or town license tax or levy. The license is a personal privilege and not transferable, and only one representative may sell thereunder; for each additional representative he gets a certificate from the auditor, paying therefor \$5.

(3) *Licensed merchant selling at his store.*—He may sell under his merchant's license, without any additional license or tax, sewing machines purchased from a licensed manufacturer, but if he sells at any other place than his store, he must obtain a certificate from the auditor, paying therefor \$5, and \$5 for a certificate for each salesman, and such payment shall be in lieu of any additional State, county, city, or town license tax or levy.

(4) *Other State salesmen.*—One not a manufacturer, or licensed merchant, may sell throughout the State sewing machines purchased from a licensed manufacturer, upon obtaining a certificate from the auditor and paying \$5, which is in lieu of any additional State, county, city or town license tax or levy.

(5) *Other county or city salesmen.*—Such salesman of sewing machines and accessories must obtain a license from the commissioner of the revenue, upon payment of \$20 to the treasurer, and the like privilege in another county or city on producing his license to the commissioner, and the payment of \$10. Such license is a personal privilege and not transferable.

(6) *No abatement of tax for less than year.*—The license tax to sell sewing machines or accessories is not reduced for less than a year.

(7) *Exceptions to the statute.*—The act does not prevent licensed auctioneers, or officers under legal process, from selling second-hand sewing machines which have become such by having been sold and used in this State.

(8) *Penalties.*—Any manufacturer, person, or agent violating this act, is punishable by a fine of \$100 to \$500, one-half to the informer. (Tax Bill, § 135.)

§ 61. Agents for sale of manufactured implements or machines by retail other than sewing machines.—One thus selling or taking orders therefor on commission or otherwise, unless he be the owner or duly licensed merchant at his store, must, under penalty of a fine of \$50 to \$100, be licensed, and pays a tax of \$15, but he cannot, under his license, sell through the agency of another, but such other must obtain a separate license. To sell in another county or city, he pays \$10 more. But a person paying to the State upon capital actually employed in the manufacture of the articles or machines, an annual tax of not under \$30, may, without further payment, employ agents to sell throughout the State. (Tax Bill. §§ 136-7.)

§ 62. Peddlers of manufactured implements or machines other than sewing machines, and peddlers of cooking stoves, ranges or clocks.—(1) *Manufactured implements or machines.*—A peddler of such articles must, under penalty of a fine of \$30 to \$1,000 (see section 14, above), obtain a license, and pay a tax of \$200, and to sell in another county or city he must pay \$100 more. See last paragraph under (2), below.

(2) *Cooking stoves or ranges, or clocks.*—A peddler of cooking stoves or ranges, and a peddler of clocks, must, under penalty of a fine of \$30 to \$1,000 (see section 14, above), obtain a license and pay \$500, and to sell in another county or city he must pay \$300 more.

A person selling and delivering at the same time, under a merchant's license, clocks, stoves and ranges, is deemed a peddler and must take out license accordingly. (Tax Bill, § 138.)

§ 63. Slot machines.—One having in any place a slot

machine of any description, into which are dropped money to dispose of chewing gum or other merchandise, or operating musical or other devices that operate on the nickle-in-the-slot principle, used for gain, except as a pay telephone, must, under penalty of a fine of \$20 to \$50 and forfeiture of the machine, obtain a license, and pay for every such machine or device an annual license tax of \$10, except where used solely for the sale of agricultural products or cigars, when the tax is \$3; except also on weighing machines and machines used solely for selling shoestrings, when the tax is \$2; except also on automatic baggage or parcel checking machines or receptacles, when the tax is 25 cents for each receptacle. But such machines for the sale of cigarettes, or in which the element of chance enters, will not be licensed.

This section does not apply (except as to cigarettes and chance machines) to a merchant using a slot machine inside his store, simply to make sales of his goods and merchandise; nor to the sales of individual sanitary drinking cups, or sanitary drinking cups and natural water at one cent. (Tax Bill, § 139.)

§ 64. **Dealers in pistols, dirks, or bowie knives.**—Such a dealer must, under penalty of a fine of \$25 to \$50, obtain a license, and pay an annual tax of \$20, with no reduction for less than a year. (Tax Bill, § 140.)

A city or town may, notwithstanding this section, prohibit the sale of such weapons, or a pawnbroker from dealing in them (113 Va. 47).

§ 65. **Gypsies.**—Section (141) is repealed by Acts 1918, p. 264, which also abolishes their business.

§ 66. **Social club.**—This section (142) is repealed by Acts 1908, p. 275.

LIENS OF MECHANICS AND OTHERS

See *Animals*; "Attachments," div. II., under title *Justice of the Peace*; *Attorney at Law*; *Conditional Sale or Reservation Lien or Title*; "Distress Warrant," div. IV., under title *Justice of the Peace*; *Deed of Trust*; *Execution*;

Forthcoming Bond; Judgment; Lis Pendens; Mortgage; Recognizance; Warehouse Receipts; Vendor's Lien.

§ 1. Liens embraced by this title

I. LIENS OF MECHANICS AND SUPPLY MEN

- § 2. The statute giving lien; "general" and sub-contractor defined
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- § 9. Lien of general contractor to inure to benefit of sub-contractor, etc.
- § 10. Validity and priority of lien not affected by assignments by general contractor, etc.
- § 11. Extent of lien where owner has less than a fee-simple estate
- § 12. Priority over other liens
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- § 15. In case of bankruptcy, death, or absconding, how notices served, acts done, etc.
- § 16. How satisfaction of lien marked
- § 17. Liens of employees and supply men against transportation, mining, and manufacturing companies
- § 18. Lien of mechanics for repairs of personal property
- § 19. Common law lien of bailee for repairs, storing, etc.
- § 20. Lien of hotel, boarding house, etc.
- § 21. Lien of keeper of livery stable or garage, or for pasturing or keeping horses, vehicles, etc.
- § 22. Lien of garage-keeper
- § 23. Enforcement of liens under sections 18 to 22 above
- § 24. Lien of stock breeders for service of stallion, jack or bull
- § 25. Lien against commission merchant
- § 26. Lien on crops for advances to farmers
- § 27. Lien of landlords and farmers for advances to tenants and laborers
- § 28. Lien of the Mutual Assurance Society
- § 29. Various forms under "Liens of Mechanics and Others"

§ 1. **Liens embraced by this title.**—Under this head we include: (1) Liens of mechanics and supply men; (2) liens of employees and supply men against transportation, mining and manufacturing companies; (3) lien of mechanics for re-

pairs of personal property; (4) common law lien for repairs, etc.; (5) lien of hotel, boarding house, or house of private entertainment; (6) lien of keeper of livery stable or garage, or for pasturing or keeping horses or other animals, or keeping vehicles or harness; (7) lien of stockbreeder for service of a stallion, jackass, or bull; (8) lien against a commission merchant, failing or dead; (9) lien on crops for advances to farmers; (10) lien of landlords and farmers for advances to tenants and laborers; and (11) lien of the Mutual Assurance Society for assessments.

I. LIENS OF MECHANICS AND SUPPLY MEN

§ 1. The statute giving lien; "general" and "sub-contractor" defined.—By section 6426 of the Code: "All persons performing labor, or furnishing materials, of the value of \$10 or more, for the construction, removal, repair, or improvement of any building or structure permanently annexed to the freehold, and all persons performing any labor or furnishing materials of like value for the construction of any railroad, shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof, and upon such railroad and franchise for the work done and materials furnished. But when the claim is for repairs or improvements only, no lien shall attach to the property repaired or improved unless such repairs or improvements were ordered by the owner, or his agent. As used in this chapter, the term 'general contractor' shall include contractors, laborers, mechanics, and persons furnishing materials, who contract directly with the owner, and the term 'sub-contractor' shall include all such contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor."

§ 3. Perfection of lien by general contractor.—To perfect his lien, he must, after the work is done and materials furnished and within 60 days from the completion of the building, etc., or the termination of the work thereon, file in the clerk's office there, a memorandum of the names of the property owner and claimant of the lien, the amount and con-

sideration of his claim, and the times when due and payable, verified by the oath of the claimant, or his agent, including a statement declaring his intention to claim the lien, and giving a brief description of the property on which he claims the lien. The clerk must record the memorandum in the Miscellaneous Lien Book, and index it both in that book and the General Index of Deeds, when all persons shall be deemed to have notice thereof. The costs of recording is taxed against the party found liable in the suit enforcing the lien. (Code, §§ 6427, 3393 (as amended by Acts 1920, p 313).)

An assignee of the claim may file the memorandum and perfect the lien, with the same rights as the assignor (Code, § 6440), but subject to section 10, below.

For forms of claiming such lien, with affidavit, given in the statute, see No. 1, under section 29, below.

§ 4. Perfection of lien by sub-contractor; extent of lien.—To perfect his lien, he must comply with the preceding section and in addition give notice in writing, to the property owner or his agent of the amount and character of his claim; but the amount of his lien must not exceed the amount the owner is indebted to the general contractor at the time of the notice, or shall thereafter become indebted to him upon his contract. (Code, § 6428.)

For form of claiming such lien, with affidavit and notice, given in the statute, see No. 2, under section 29, below.

§ 5. Perfection of lien for labor or material furnished sub-contractor; extent of lien.—Any person performing labor or furnishing materials for a sub-contractor, to perfect his lien, must comply with section 3, above, as to general contractors, and in addition give notice in writing to the owner of the property, or his agent, and also to the general contractor, or his agent, of the amount and character of his claim. But the amount of his lien must not exceed the amount the sub-contractor could claim a lien for under section 4, above (i. e., the amount in which the owner is indebted to the general contractor). (Code, § 6429.)

For form of claiming such lien, with affidavit and notice, given in the statute, see No. 3, under section 29, below.

§ 6. What inaccuracies not to affect lien.—No inaccuracy in the memorandum filed or description of the property

to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given, and the memorandum conform substantially to the requirements of the statute, and is not wilfully false. (Code, § 6431.)

§ 7. What owner may do when contractor fails or refuses to complete building, etc.—If the owner is compelled to complete the building, etc., or any part thereof, because of the general contractor's failure or refusal to do so, the amount thus spent by him shall have priority over all liens by general or sub-contractor, or any one furnishing labor or material. (Code, § 6432.)

§ 8. Limitation of lien.—The limitation for the enforcement of any of the forgoing liens is 12 months from the time the whole amount covered by such liens has become payable; but the filing of a petition in another suit is regarded as the institution of a suit. (Code, § 6433.)

§ 9. Lien of general contractor to inure to benefit of sub-contractor, etc.—The general contractor's lien inures to the benefit of the sub-contractor, and of any person performing labor or furnishing materials to a sub-contractor who has not perfected a lien on such building or structure, provided he gives written notice of his claim against the general contractor or sub-contractor, as the case may be, to the owner or his agent before the amount of such lien is actually paid off or discharged. (Code, § 6434.)

§ 10. Validity and priority of lien not affected by assignments by general contractor, etc.—By section 6435 of the Code: "Every assignment or transfer by a general contractor, in whole or in part, of his contract with the owner or of any money or consideration coming to him under such contract, or by a sub-contractor of his contract with the general contractor, in whole or in part, or of any money or consideration coming to him under his contract with the general contractor, and every writ of *fiери facias* (i. e., execution), attachment or other process against the general contractor or sub-contractor to subject or encumber his interest arising under such contract, shall be subject to the liens given by this chapter to laborers, mechanics, and material-men. No such assignment or transfer shall in any way affect the validity or the priority of satisfaction of liens given by this chapter."

For how notice may be given of the assignment of a debt secured on land by mechanic's lien, see *Deed of Trust*, at end of section 8.

§ 11. Extent of lien where owner has less than a fee simple estate.—If the person having the work done owns less than a fee simple estate in the land, only his interest is liable. (Code, § 6436.)

§ 12. Priority over other liens.—As to the building or structure erected, or materials furnished and used therein, the foregoing liens have priority over prior liens or encumbrances upon the land; and as to the land, they have priority over liens or encumbrances created after the work was commenced or materials furnished. And in the enforcement of the mechanic's lien, etc., a prior lien or encumbrance created upon the land is preferred only to the value of the land estimated, exclusive of the building or structure, at the time of sale, and the residue of the proceeds is applied to the mechanic's liens, etc. (Code, § 6436.)

§ 13. How liens are enforced; no priority, except, etc.—They are enforced in a court of equity, where the building, etc., or a part thereof, or one of the owners is. The plaintiff must file with his bill an itemized statement of his account, showing the amount and character of the work done, or materials furnished, the prices charged therefor, the payments made, if any, the balance due, and the time from which interest is claimed thereon; the correctness of which account must be verified by his or his agent's affidavit. When a suit is brought, all other lien-holders may come in by petition. There is no priority among them, except the lien of a sub-contractor is preferred to that of his general contractor; and the lien of persons performing labor or furnishing materials for a sub-contractor is preferred to that of such sub-contractor. (Code, § 6437.)

§ 14. Sheriffs, sergeants, and constables to serve notices.—Such officer, when so required, must serve any notice authorized or required by this chapter. (Code, § 6430.)

§ 15. In case of bankruptcy, death or of absconding, how notice served, acts done, etc.—Where an act is required to be done by or a notice given to a person, if such person become bankrupt, the bankrupt or trustee takes his place; or if

such person die, his administrator or executor; or if he abscond, the notice may be given to any person over 16 at his last known place of residence or business, and if no such person there, by posting the notice at the front door of such place, or at some other conspicuous part of the building, or he may be proceeded against by order of publication as a non-resident. (Code, § 6442.)

§ 16. How satisfaction of lien marked.—The same as in case of a deed of trust, etc.—see *Deed of Trust*, section 15. (Section 6441 of the Code, on the same subject has been repealed as unnecessary—Acts 1920, p. 388.)

II. OTHER LIENS

§ 17. Liens of employees and supply men against transportation, mining and manufacturing companies.—They have a prior lien on the franchises, gross earnings, and all property of the company, as against all mortgages, deeds of trust, sale, pledge, or conveyance since May 1, 1888 (when the Code of 1887 went into effect). There are no priorities among the liens of this section, except that a supply lien is subsequent to that allowed to clerks, mechanics, and laborers. A person cannot claim under this and under section 2, above. (Code, § 6438, as amended by Acts, 1922.) To perfect such lien, the party must within 90 days after the last item of his bill, file in the clerk's office a similar memorandum as in section 3, above; and the lien is enforced in a court of equity. (Code, § 6439.)

An assignee of the claim may file the memorandum and perfect the lien, with the same rights as his assignor. (Code, § 6440.)

Such liens may be marked satisfied as in the case of a deed of trust, etc.—see *Deed of Trust*, section 15. Sections 14 and 15 above, also apply in case of these liens.

§ 18. Lien of mechanics for repairs of personal property.—By statute (§ 6443), for any alteration or repairs done at the owner's request, the mechanic (whether a blacksmith, a jeweler, an automobile or other mechanic), has a lien on the property for his just and reasonable charges therefor, and may retain possession thereof until such charges are paid. For enforcement of this lien, see section 23, below. This lien

is not as broad as the common law lien for repairs, but the deficiency is recognized and provided for in the statute for the enforcement of liens. See next section.

§ 19. Common law lien of bailee for repairs, storing, etc.—This is treated under the law of ‘bailment,’—i. e., where property is delivered to another for different purposes, as, repairs, etc. (22 Grat. 254); and it will be observed that in the enforcement statute this common law lien is expressly mentioned—see *Bailment*, section 4; and section 23, below.

§ 20. Lien of hotel, boarding house, etc.—By statute (§ 6444), every “inn-keeper” (i. e., hotel-keeper), and “keeper of a boarding house, or house of private entertainment,” has a lien on, and may retain possession of, the baggage and other property of his guest or boarder brought upon the premises, and also upon the property of the employer of such guest or boarder in the course of his employment (as, an agent or salesman having goods of his employer with him), for the proper charges due from such guest for his board and lodging. The lien does not extend to goods which he actually wears on his person. (3 Min. 292.)

For enforcement of this lien, see section 23, below.

For punishment for defrauding hotel-keepers, and their duties and liabilities, see *Hotels*.

§ 21. Lien of keeper of livery stable or garage, or for pasturing or keeping horses, vehicles, etc.—By statute (§ 6445), a keeper of a livery stable or garage, or a person pasturing or keeping any horses, or other animals, “vehicles” (including automobiles), or harness, has a lien thereon for the amount due him for the keeping, supporting and care thereof, until such amount is paid.

For enforcement of this lien, see section 23, below.

§ 22. Lien of garage-keeper.—See section 21, above.

§ 23. Enforcement of liens under sections 18 to 22, above.—Any lien-holder mentioned in §§ 18 to 22 above, if the debt is not paid within 10 days after due, and the value of the property does not exceed \$20, may sell the property, after advertising the sale, giving the owner, if within the county or corporation, ten days’ written notice of the same and the amount claimed; if the owner cannot be found, the notice must be posted at three public places. The sale is made

by public auction for cash, and any surplus is paid to the owner. If the value of the property is over \$20 and not over \$100, the party, after giving notice as above, applies by petition to a justice, or if the value exceeds \$100, to court, for the sale of the property, and the justice or court upon hearing may order the constable, sheriff, or sergeant to make the sale as above. And by sections 6450-1, any person may file his petition before the property is sold or the proceeds are paid over, disputing the lien, or stating a claim to or an interest in or lien, on the property, and its nature, which will be inquired into by the justice or court. But, in either case, an appeal may be taken from the justice, as in the case of warrants for small claims.

§ 24. Lien of stockbreeders for service of stallion, jack, or bull.—The owner of a licensed stallion or jackass, has for his fee a lien on a colt foaled by him for 12 months only, or until (within that time) the price agreed upon for the season or service be paid. When judgment is taken, the officer levies the execution on the colt, and sells for the amount and costs. The lien, if in writing, must be recorded in the Miscellaneous Lien Book, and is operative from the recordation; if not in writing, the clerk, upon application of the owner of the stallion or jackass, records the lien as follows: “_____ (giving the name of the owner of the stallion or jackass) versus _____ (giving the name of the owner of the colt). The owner of the stallion or jackass claims a lien on a colt less than 12 months old for \$——, for the get thereof.” The clerk’s fee is 30 cents. (Code, § 6446.)

A bull owner may procure a special license privilege for his service on paying \$2.50 for each animal. He has for his fee a lien on a calf (for the get thereof) for 6 months; but the lien is void as against an innocent purchaser for value and without notice, except it be recorded in the Miscellaneous Lien Book, which may be done as follows: “_____ (giving the name of the owner of the bull; versus _____ (giving the name of the owner of the calf). The owner of the bull claims a lien on a calf less than 6 months old for \$——for the get thereof.” The clerk’s fee is 25 cents. (Code, § 6447.)

§ 25. Lien against commission merchant.—Where any farm product consigned to a commission merchant for sale,

has been sold, and he becomes insolvent or dies before paying over the proceeds to, or on account of, the consignor or owner of the produce, the latter's claim, when legally proved, is a lien on the commission merchant's estate, subject only to such liens thereon and recorded prior to said insolvency or death; but no lien shall attach where the consignor or owner, without requesting payment, allows the said proceeds to remain with the commission merchant at interest, or in his hands over 30 days after becoming informed of such sale. Courts of equity may enforce this section. (Code, § 6448.)

§ 26. Lien on crops for advances to farmers.—If a person, not a landlord, makes advances, either in money, supplies, or other thing of value, to one engaged in or about to engage in the cultivation of the soil, he has a lien, to the extent of the advances, on the crops made or seeded during the year upon the lands where the advances have been or were intended to be expended; but he has no lien unless there is an agreement in writing between the parties, specifying the amount advanced or a limit to the amount of the advances from time to time during the year, and the same is docketed or recorded in the clerk's office, in the "Crop Lien Book"; and such lien is valid as to purchasers (including creditors under a deed of trust or mortgage, who, in law, are purchasers) without notice from any creditors (by lien) of the person making the advances only from the time the said agreement has been delivered to the clerk to be docketed. (Code, 6452, as amended by Acts 1920, p. 339.)

For what liens and rights this section does not affect, see last paragraph under next section.

Sale or other disposal of said crops may be stopped by injunction (Code, § 6453).

§ 27. Lien of landlords and farmers for advances to tenants and laborers.—If an owner or occupier of land contract with a person to cultivate the same as his tenant for rent either in money or a share of the crop; or if a person, engaged in the cultivation of land, contract with a laborer thereon for a share of the crop as his wages; and, in either case, such person makes advances in money, supplies or other thing to such tenant or laborer, he has a lien therefor on all the crops, or the share of such laborer in the crops, made

or seeded on the land during the year, in which the advances were made, which is prior to all other liens thereon, and may be enforced by distress when the claim is due, or by attachment when the claim is not yet payable, as is given a landlord for the recovery of rent under sections 5522 and 6416 of the Code (see "Distress," div. IV., under title *Justice of the Peace*, and "Attachments," div. II., under title of *Justice of the Peace*): Provided, he or his agent, before suing out the distress warrant, make affidavit before the justice to the amount of the claim, that it is then due and is for advances made under contract to a tenant cultivating his land, or a laborer working the same; and before suing out the attachment, make the like affidavit, and also at what time the claim will become payable, and that the debtor intends to remove, or is removing from such land, the said crops, or his portion thereof, or share therein, so that there will not be left enough to satisfy the claim. The defendant has all the rights and remedies allowed a tenant against a distress or attachment for rent. (Code, § 6454.)

The lien of section 26, above, does not affect the rights of the landlord to his proper share of rents, or his lien for rent or advances, or his right of distress or attachment for the same; nor any prior lien required to be and actually recorded; nor the right of the party to whom the advances have been made to claim such part of his crops as is exempt from levy of distress for rent. (Code, § 6455.)

§ 28. Lien of the Mutual Assurance Society.—Purchasers for valuable consideration without notice are not affected by the liens of such society, for assessments, on buildings, until such liens are filed in the clerk's office. (Code, § 6458.)

§ 29. Various forms under "Liens of Mechanics and Others."

No. 1. MEMORANDUM OF MECHANIC'S LIEN CLAIMED BY GENERAL CONTRACTOR

(Code, § 6427.)

——— (contractor) claims that ——— (owner) is indebted to him in the sum of ———, dollars (\$——) for work done (or *materials furnished*, or both, as the case may be), in and about the construction (or *removal, repair, or improvement*, as the case may be), of a ———

(describe nature of structure, whether dwelling, store, or, etc.,) in the county (or city) of _____ with interest thereon from the _____ day of _____ until payment, which sum is now due and payable (or *will be due and payable, as follows, to-wit:* _____), and for which sum of _____ dollars the said _____ (contractor) claims a lien on the following described property of the said _____ (owner) to-wit: _____ (insert description of property).
 _____ (Date).
 _____ (Name of contractor).

AFFIDAVIT

State of Virginia,

County (or city) of _____, to-wit:

I, _____ (notary or other officer) for the county (or city) aforesaid, do certify that _____ (contractor, or agent for _____, as the case may be,) this day made oath before me in my county (or city) aforesaid that _____ (the owner) is justly indebted to him (or to _____ contractor, as the case may be) in the sum of _____ dollars, for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the _____ day of _____, 192—. _____ (N. P. or J. P., etc.)

NO. 2. MEMORANDUM OF MECHANIC'S LIEN CLAIMED BY SUB-CONTRACTOR
 (Code, § 6428.)

_____ (sub-contractor) claims that _____ (general contractor) is indebted to him in the sum of _____ dollars (\$____) for work done (or *materials furnished*, or both, as the case may be) for him, in and about the construction (or removal, repair or improvement, as the case may be,) of a _____ (describe nature of structure, whether dwelling, store, or, etc.,) which he has contracted to construct (or *remove*, etc.), for _____ (owner), which sum bears interest from the _____ day of _____, 192—, and is now due and payable (or *will be due and payable as follows, to-wit:* _____). For the foregoing sum due to the said _____ (sub-contractor) as aforesaid, he claims a lien on the following described property of the said _____ (owner), to-wit: _____ (insert description of property).
 _____ (Date).

_____ (Sub-contractor).

AFFIDAVIT

State of Virginia,

County (or city) of _____, to-wit:

I, _____ (notary or other officer) for the county (or city) aforesaid do certify that _____ (sub-contractor, or his agent, as the case may be,) this day made oath before me in my county (or city) aforesaid that _____ (general contractor) is justly indebted to him (or to _____, sub-contractor, as the case may be,) in the sum of

**No. 4. MEMORANDUM OF LIEN OF EMPLOYEES AND SUPPLY MEN CLAIMED
AGAINST TRANSPORTATION, MINING, OR MANUFACTURING COMPANY**
(Code, § 6439.)

Know all men by these presents that under and by virtue of the statutes of Virginia in such cases made and provided I hereby claim a prior lien on the franchises, gross earnings, and all real and personal property of _____, a transportation (*mining or manufacturing*) company, by reason of having furnished said company with certain supplies necessary to its operation (or *with labor or service in the capacity of* _____). The amount and consideration of my claim, and when each item thereof was or is to become due and payable, is truly and in detail set forth in the account. (Here insert account.)

Given under my hand this _____ day of _____, 192—.

Append an acknowledgment.

**No. 5. NOTICE OF SALE OF PROPERTY OF \$20 OR LESS IN VALUE TO SATISFY
LIEN FOR REPAIRS, ETC.**

(Code, §§ 6443-5, 6449.)

For the enforcement of a lien which I have on one silver watch of the value of \$15, for repairs thereon done at the request of the owner [or "on one valise with contents of the value of \$5, for board and lodging at my boarding house (or *inn or ordinary or house of private entertainment*);" or "on one set of single buggy harness of the value of \$5, for keeping, supporting, and caring for a horse"], for the sum of \$5, due by one A. B., and pursuant to section 2491 of the Code of Virginia, providing for the enforcement of said lien, I shall, on the _____ day of _____, 192—, at _____ o'clock a. m. (or p. m.), of that day, at _____, in _____ county, Va., offer for sale, by public auction, for cash, to the highest bidder, the said watch (*valise with contents or set of harness*) to satisfy my said lien.

This _____ day of _____, 192—.

A. B.

No. 6. NOTICE TO OWNER IN SUCH CASE

(*Idem.*)

To Mr. B. C.:

Take notice that on the _____ day of _____, 192—, at _____ o'clock a. m. (or p. m.), of that day, at _____, in _____ county, Va., I shall offer for sale, by public auction, for cash, to the highest bidder, unless the amount due me is sooner paid, one silver watch (*valise with contents or set of single buggy harness*) to satisfy a lien which I have thereon, for the sum of _____ dollars (not exceeding \$20), due by you for repairs done on said watch at your request [or "for board and lodging at my boarding house (or *inn or ordinary or house of*

_____ dollars for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the _____ day of _____, 192—.
 _____ (N. P. or J. P., etc.)

NOTICE

To _____ (owner).

You are hereby notified that _____ (general contractor) is indebted to me in the sum of _____ dollars (\$—) with interest thereon from the _____ day of _____, 192—, for work done (or materials furnished, as the case may be,) in and about the construction (or removal, etc.,) of a _____ (describe structure, whether dwelling, store, or, etc.,) which he has contracted to construct (or remove, etc.,) for you, in the county (or city) of _____, and that I have duly recorded a mechanic's lien for the same.

Given under my hand this the _____ day of _____, 192—.
 _____ (Sub-contractor).

No. 3. MEMORANDUM OF MECHANIC'S LIEN CLAIMED BY SUB-SUBCONTRACTOR

(Code, § 6429.)

_____ (sub-contractor claims that _____ (sub-contractor) is indebted to him in the sum of _____ dollars (\$— for work done (or materials, etc.,) for him as sub-contractor under _____ contractor to construct (or remove, etc.,) a _____ (describe structure, whether dwelling, store, or, etc.,) for _____ (owner) which sum bears interest from the _____ day of _____, 192—, and is now due and payable (or will be due and payable as follows, to-wit: _____). For the foregoing sum of \$—, due to the said _____ (sub-subcontractor) he claims a lien on the following described property of the said _____
 _____ (Date).

(owner), to-wit: _____ (insert description of property).
 _____ (Sub-subcontractor).

AFFIDAVIT

State of Virginia,

County (or city) of _____, to-wit:

I, _____ (notary or other officer) for the county (or city) aforesaid do certify that _____ (sub-subcontractor, or his agent, as the case may be,) this day made oath before me, in my county (or city) aforesaid that _____ (sub-contractor) is justly indebted to him (or to _____, sub-contractor, as the case may be,) in the sum of _____ dollars for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the _____ day of _____, 192—.
 _____ (N. P., or J. P., etc.,)

parcel of land aforesaid, and which the said F. F., for himself and his heirs, agrees to repay in gold to the said M. M., or his assigns, on or before the _____ day of _____, 192—, with lawful interest on the several advances aforesaid, from the time when they were respectively made, until payment. And it is further agreed by and between the said parties, that the said M. M. shall be entitled to a lien, according to the statute in that case made and provided, to the extent of the advances which he shall make as aforesaid to the said F. F., on all the crops which may be made by the said F. F., on the said tract or parcel of land, during the year aforesaid, ending on the _____ day of _____, 192—.

Witness the hands and seals of the said parties, this _____ day of _____, in the year our Lord 192—.

M. M. (SEAL.)

F. F. (SEAL.)

No. 11 AFFIDAVIT FOR DISTRESS WARRANT FOR ADVANCES BY LANDLORD,
TO TENANT OR LABORER

(*Idem.*)

County of _____, to-wit:

This day personally appeared before me J. T., a justice of the peace in and for the county aforesaid, in the State of Virginia, L. L. (or A. A., *agent for L. L.*), and made oath that there is now justly due to him (or to the said L. L.), from T. T., the sum of _____ dollars and _____ cents with interest thereon from the _____ day of _____, 192—, and that the same is for advances made under contract to the said T. T., a tenant cultivating the lands of said _____ (or a laborer working the lands of L. L.)

Given under my hands, this _____ day of _____, 192—.

J. T., J. P.

For distress warrant, see "Distress Warrant," div. IV., under title *Justice of the Peace*.

No. 12. AFFIDAVIT FOR ATTACHMENT IN SUCH CASES, WHERE CLAIM IS
NOT DUE

(*Idem.*)

County of _____, to-wit:

This day personally appeared before me J. T., a justice of the peace in and for the county aforesaid, in the State of Virginia, L. L. (or A. A., *agent for L. L.*), and made oath that there is justly owing to him (or to the said L. L.) from T. T., the sum of _____ dollars and _____ cents, which amount is for advances made by him under contract to the said T. T., a tenant cultivating the lands of said L. L. (or laborer working the lands of said L. L.), which said amount will be payable on the _____ day of _____, 192—, and that said T. T.

intends to remove or is removing from such lands the crops, or his portion of the crops, or share therein, so that there will not be left enough to satisfy the said claim of the said L. L.

Given under my hand, this _____ day of _____ 192—.

J. T., J. P.

For attachment, see "Attachments," Div. II., under title *Justice of the Peace*.

No. 13. NOTICE OF APPLICATION TO HAVE MECHANIC'S LIEN MARKED
SATISFIED
[See No. 6, under *Deed of Trust*.]

No. 14. PETITION IN SUCH CASE
[See No. 7, under *Deed of Trust*.]

No. 15. COURT ORDER IN SUCH CASE
[See No. 8, under *Deed of Trust*.]

LIMITATIONS TO REMEDIES

(See Burks' "Pleading & Practice" (new ed), title "Limitation of Actions.")

- § 1. Limitations in equity
- § 2. Common law limitations
- § 3. Statute of limitations
 - (1) In general
 - (2) Periods of limitation prescribed by statute
 - (a) Unlawful or forcible entry or detainer
 - (b) Entry on, and actions for land
 - (c) Contract under seal; fiduciaries
 - (d) Written contract not under seal, or an award
 - (e) Contracts not in writing
 - (f) Accounts between partners and merchants
 - (g) Contract or award of deceased
 - (h) Recognizance for appearance or good behavior
 - (1) Motion against officer for failure to return execution

LIMITATIONS TO REMEDIES

- (i) Ground rents
- (k) Any other personal action
- (l) Deed of trust, mortgage, or vender's lien
- (m) Judgment
- (n) Voluntary conveyance
- (o) Bill to repeal a grant
- (p) Distress
- (q) Appeals
- (r) Motion to correct a judgment in same court
- (s) Bills of review
- (t) Re-hearing
- (u) Criminal prosecutions
- (v) Miscellaneous instances
- (3) When limitation commences to run
 - (a) Generally
 - (b) Money in bank
 - (c) Bond of administrator, executor, guardian, etc.
 - (d) Money paid under fraud or mistake
 - (e) Accounts
- (4) When limitation repelled
 - (a) As to administrator, executor, guardian, or other fiduciary
 - (b) As to subsequent acknowledgment or promise
 - (c) When suspended in creditors' suit
 - (d) Promise not to plead the statute
 - (e) Where suit prevented by non-residence or other act of defendant
 - (f) Where cause of action accrued elsewhere
 - (g) Where suit fails for certain causes
 - (h) Where limitation is repealed
- (5) State not within statute of limitations
- (6) Effect of Code, 1919, as to existing rights and remedies

§ 1. Limitations in equity.—Courts of equity have ever refused relief to stale demands, and independently of statute, have discountenanced gross “laches,” or long or unreasonable neglect to enforce one’s claims; and laches does not depend upon the length of time alone, but also upon proper diligence under all the circumstances; but in the absence of negligence, the period of limitation prescribed by statute for actions at law govern; in fact, in analagous cases, equity follows the rule at law. (See “Laches” in some Virginia digest.)

§ 2. Common law limitations.—The common law prescribes no limitations to actions at law; except such as may arise after the lapse of 20 years (as, prescription in case of

an easement—see *Easement*, section 2, (6)), from the presumption of satisfaction, etc., which may be repelled by proof that the claim had been neither satisfied nor relinquished, as, by the debtor's acknowledgment of the debt, or having made a payment on principle or interest, within the 20 years; or by his removal to another state or country, with address unknown to the creditor, or by the debtor's promises to provide for the creditor by will, or by the collection being suspended by injunction, etc. This presumption of payment from lapse of time may still be relied upon, even where the statute of limitations would have been applicable had it been pleaded. (4 Min. Inst. 602-3.)

§ 3. Statute of Limitations.—

(1) *In general.*—The statute of limitations applies to all actions at law, real and personal; and to several cases in equity, as, the enforcement of a mortgage, deed of trust, or vendor's lien, or to avoid a grant or voluntary conveyance, etc.—see (1) and (n), under (2), below.

(2) *Periods of limitation prescribed by statute.*—They are as follows:

(a) *Unlawful or forcible entry or detainer*, 3 years—Code, § 5445.

(b) *Entry on, and actions for land*, other than forcible entry, 15 years east and 10 years west of the Alleghany mountains, with exceptions as to minors and insane persons—§§ 5805-8.

(c) *Contract under seal; fiduciaries.*—Contracts, whether made by a private person, public officer, an administrator, executor, committee, guardian, trustee, or other fiduciary, 10 years—§ 5810; or where such fiduciary has settled his accounts as required by law, a suit to surcharge and falsify the same, or to hold either him or his sureties liable for any balance against him on the account, the limitation is 10 years after the account has been confirmed—§ 5811. See, also, sub-section (4)—(a), below.

(d) *Written contract not under seal, or an award*, 5 years—§ 5810.

(e) *Contracts not in writing*, express or implied, 3 years—§ 5810, except—

(f) *Accounts between partners, and merchants and their*

factors (or common merchants), or servants 5 years from cessation of dealings between them—§ 5810.

(g) *Contract or award* of deceased, not over 5 years from qualification of administrator or executor, or if the right of action had not accrued at his death, not over 5 years from its accrual—§ 5810. But one year from the death of any one is excluded from the period of limitation—§ 5809 (which, however, does not apply to death by wrongful act—99 Va. 189); and if a person dies before the right of action accrues, and there be over 2 years (after his death) before the qualification of his administrator or executor, he is deemed to have qualified on the last day of the two years—§ 5824.

(h) *Recognizance for appearance or good behavior*, 10 years; if in a civil case, 3 years after the right to sue out execution upon the judgment shall have accrued, omitting the time of suspension by injunction, supersedeas, or other legal process—§ 5815.

(i) *Motion against officer for failure to return execution*, 10 years from the return day—§ 5816.

(j) *Ground rents*, 10 years—§ 5817.

(k) *Any other personal action*, where the action is revivable against the defendant's administrator or executor (as are all actions arising out of contract, and also all torts or wrongs relating to property), 5 years, but in the case of death by wrongful act, 1 year—§§ 5818, 5787, as amended by Acts 1920, p. 26 and § 5781; where the action is not so revivable (as in the case of slander, assault and battery, etc.), 1 year—5818.

(l) *Deed of trust, mortgage, or vendor's lien*, 20 years from the time the obligation last maturing thereby secured shall have become due and payable, with an additional year from the death of the lienholder. (Code, § 5827, as amended by Acts 1922.) See *Deed of Trust*, section 7.

Though the debt may be barred, yet the lien may be enforced (119 Va. 813).

(m) *Judgments* and "recognizances, and bonds having the force of a judgment, *scire facias* or action on, 10 years, and where kept alive by executions and returns thereon, 20 years—§§ 6477-8, 6040; foreign judgments, the period prescribed by the foreign laws, not over 10 years—§ 5819. See, also, *Judgments*, section 6.

(n) *Voluntary conveyance*,—i. e., “a gift, conveyance, assignment, transfer or charge (as, a deed of trust or mortgage), which is not on consideration deemed valuable in law or which is upon consideration of marriage,” 5 years from its recordation, or if not recorded, 5 years from the time the same was or should have been discovered—§ 5820.

This limitation applies only where the conveyance is impeached simply because it is voluntary, (i. e., with consideration). If it be impeached for actual fraud (of which its being voluntary may be partial proof), the statute does not apply, there being no limitation in such a case (12 Grat. 363). See, also, *Fraudulent and Voluntary Conveyances*.

(o) *Bill to repeal a grant*, 10 years—§ 5822.

(p) *Distress*, for rent, 5 years—§ 5522; for taxes, 1 year from June 15th, following assessment year—§§ 2440, 2412;

(q) *Appeals*, 1 year, but if from a final order, judgment or finding of the State Corporation Commission, 6 months—§ 6337; from board of supervisors, 6 months—§ 2761; from clerk's probate of a will, 1 year—§ 5248;

(r) *Motion to correct a judgment in same court*, 3 years—§ 6333;

(s) *Bills of review*, 1 year from the decree, or from the removal of any disability of minority or insanity—§ 6313;

(t) *Re-hearing*, 2 years where not served with process, and 1 year where served—§ 6072.

(u) *Criminal prosecutions*: Perjury, 3 years; petit larceny, 5 years; attempt to produce abortion, 2 years; a misdemeanor, or “any pecuniary fine, forfeiture, penalty, or amercement,” one year; violations of the revenue laws, 2 years—§ 2396; abduction of a female for defilement or marriage, 2 years—§ 4413; seduction, 2 years—§ 4413; trial for felony, 3 regular terms of the circuit court or 4 of the corporation or hustings court—§ 4926.

(v) *Miscellaneous instances*: (1) Recovery of damages to adjacent land by the establishment of a cemetery, 1 year—§ 56;

(2) Recovery of money paid on a void school contract, 2 years—§ 683;

(3) Action by a guest against a hotel keeper, 1 year—§ 1606;

(4) Claims against the State 10 years—§§ 2179, 258, or 2 years from time allowed by a court—§ 2180;

(5) Corrections of erroneous assessment of taxes on property, 2 years from September 1st of the year of the assessment, or if on income or a license, 1 year from that time—§ 2385, as amended by Acts 1920, p. 316, §§ 2387-8, and § 2389, as amended by Acts 1920, p. 341;

(6) Redemption of land sold for delinquent taxes, 2 years from the day of sale—§§ 2475, 2482, and if deed not made within the 2 years, 1 year longer allowed—§§ 2475, 2482, 2487, or after 1 year from the date of application to purchase land bought in by the State, if no deed be made within three years—§ 2495—*Delinquent Tax Sales*, sections 15, 16, (4); suit to cancel tax deed, 2 years (except for fraud) after admission to record—§ 2488—see *Delinquent Tax Sales*, section 20;

(7) Actions against an officer for an illegal contract with a county, 2 years after payment by the county—§ 2707;

(8) Recovery back of illegal claim allowed by board of supervisors, 2 years from order of allowance—§ 2759;

(9) Petition of officer for salary withheld for debt due the State, 12 months—§ 3477;

(10) Recovery of officer's fees 5 years after service rendered—§ 3500;

(11) Claim for witnesses' fees; 2 years, after service rendered, and entry of attendance at court, 60 days from end of the term—§§ 3531-2;

(12) Suits against directors of corporations, 2 years—§ 3816;

(13) Recovery on contract with company acting as bank of circulation, 1 year after payment—§ 4151;

(14) Provisions in insurance policy limiting action to one year not valid—§ 4227;

(15) Suit to set aside fraudulent transfer of stock of merchandise, 6 months—§ 5187;

(16) Bill to impeach or establish a will admitted to probate, 2 years, or one year after removal of any disability of minority or insanity—§§ 5259-60;

(17) Probate of will against purchaser from heir, 1 year—§ 5263;

(18) Setting aside for fraud compromise of suit on behalf of an infant, 6 months after coming of age—§ 5332;

(19) Suit against a legatee or distributee for refund to creditors, 5 years—§ 5439;

(20) Action by an infant or insane person to set aside a judgment in ejectment, 5 years—§ 5487;

(21) Recovery of usury, 1 year—§ 5555;

(22) Recovery of money or property lost in gambling, 3 months—§ 5559;

(23) Claim of juror for attendance and mileage, 2 years—§ 6010;

(24) Recovery of unclaimed court funds paid into the treasury, 10 years—§ 6314;

(25) Mechanic's lien, 12 months from the time the whole claim is payable—§ 6433;

(26) Motion for a new execution by an obligor in an indemnifying bond, against whom there has been a recovery thereon, 5 years—§ 6498.

(3) *When limitation commences to run.*—

(a) *Generally.*—Generally and in all cases where not otherwise provided, the statute commences to run from the time when the right of action accrued.

As to when the right of action accrues, see in the enumeration of (2), above, and further note the following distinctions:

(b) *Money in bank.*—The limitation to an action or other proceedings for money on deposit with a bank or any person or corporation doing a banking business, shall not begin to run until a request in writing be made therefor by check, order or otherwise. (Code, § 5810.)

(c) *Bond of administrator, executor, guardian, etc.*—In the case of a guardian or curator of a ward, when the child attains 21, or the office otherwise ends; in case of an administrator, executor, or committee, at the return day of an execution against such person, or from the time the right to require payment or delivery of the estate upon the order of the court acting upon the account of his administration. (Code, § 5811.)

(d) *Money paid under fraud or mistake.*—"The right to recover money paid under fraud or mistake shall be

deemed to accrue both at law and in equity at the time such fraud or mistake is discovered, or by the exercise of due diligence ought to have been discovered." (Code, § 5811.) See (4), (e), below.

(e) *Accounts*.—In the case of store accounts, the time the action accrues depends upon the terms, express or implied, upon which the articles are sold. If the plaintiff is notoriously accustomed to sell his goods to be paid for the first of January, July, or at the end of each month or week, or other time, and this usage is known to the defendant, the right of action then accrues. (4 Min. Inst. 613.)

(f) *As to minors and insane persons*.—Where such a disability exists when the right of action accrued, the limitation commences to run upon the removal of the disability, but the whole period must not be over 20 years—§ 5823. If both disabilities existed when the right of action accrued, either may be relied on (9 Leigh, 495; 77 Va., 67; 78 Va., 529).

(4) *When limitation repelled*.—(a) *As to administrator, executor, guardian, or other fiduciary*.—While a suit against such fiduciary, himself, or his representatives, not founded on his bond, but on his failure to discharge a trust committed to him, is not barred by any statute, yet it may be repelled by presumption of satisfaction at common law by the lapse of 20 years, which, however, may be repelled—see section 2, above, and sub-section (2), (c) above. (Code, § 5811.)

(b) *As to subsequent acknowledgment or promise*.—The limitation is renewed to commence as from the date of such new promise, or acknowledgment from which a promise may be implied; which must be in writing signed by the defendant or his agent. (Code, § 5812.) And it must be a promise to pay a debt, or a distinct acknowledgment that a definite amount is due. A promise to settle or an acknowledgment that something is due, but designating no certain amount, will not repel the statute. The new promise or acknowledgment may be made to a third person as well as to the creditor himself.

But no acknowledgment or promise by an administrator or executor, or by one or more joint contractors shall repel the bar of the statute as to the estate of the deceased or another joint contractor. (Code, § 5813.)

The old debt still subsisting, but only the remedy being barred, it is a sufficient consideration for the new promise. (4 Min. Inst. 616-18.)

No provision in a will making real estate subject to, or charging it with debts, shall repel the bar of the statute, unless it plainly appears to be the testator's intention. (Code, § 5814.) See, also, *Contracts*, section 4, (8).

(c) *When suspended in "creditors' suit."*—By Acts 1920, page 87: "When a suit in chancery is commenced as a general creditor's suit, or as a general lien creditors' suit, or as a suit to enforce a mechanics' lien, the running of the statute of limitations shall be suspended as to debts provable in such suit from the commencement of the same, provided they are brought in before the master under the first reference for an account of debts; but as to claims not so brought in the statute shall continue to run, without interruption by reason either of the commencement of the suit or of the decree for an account, until a later decree for an account, under which they do come in, or they are asserted by petition or independent suit or action. In suits not instituted originally either as general creditors' suits, or as general lien creditors' suits, but which become such by subsequent proceedings, the statute of limitations shall be suspended by a decree of reference for an account of debts or of liens only as to those creditors who come in and prove their claims under the decree and as to creditors who come in afterwards by petition or under a decree of recommittal, or a later decree of reference for an account, the statute shall continue to run without interruption by reason of previous decrees until filing of the petition, or until the date of the reference under which they prove their claims, as the case may be."

(d) *Promise not to plead the statute.*—By section 5821, inserted by the Revisors of the Code 1919: "Whenever the failure to enforce a promise, written or unwritten, not to plead the statute of limitations would operate a fraud on the promisee, the promisor shall be estopped to plead the statute. In all other cases an unwritten promise not to plead the statute shall be void, and a written promise not to plead it shall have the effect of a promise to pay the debt or discharge the liability."

(e) *Where suit prevented by non-residence or other act of defendant.*—Obstruction of the plaintiff's right to sue by a resident departing from the State, or by absconding or concealing himself or by any other indirect ways or means, the time of such obstruction is deducted from the period of limitation; but this does not apply to a party jointly liable with the one so obstructing, nor to such grantees for value and those claiming under them as are mentioned in section 6474 of the Code—see *Judgments*, section 6. (Code, § 5825.)

“Residence”, within the meaning of this statute, is the permanent abiding or dwelling in a place for a length of time as contradistinguished from a mere temporary locality of existence (100 Va. 473).

It must appear that the plaintiff was actually obstructed in bringing his action, not merely that he might have been (31 Grat. 214; 87 Va., 625-6). Obstruction may be by removal of the personal property, which is the subject of the demand, to a distant county, or by dispersing it in various quarters (1 Leigh, 163). A fraud by the defendant unknown to the plaintiff will not stop the running of the statute (2 Munf. 511-12; 4 Leigh, 479-80; 17 Grat 14); neither is ignorance merely of a cause of action, not brought about by the fraud or purposed concealment of the defendant, a bar to the statute (17 Grat. 345; 76 Va. 686; 119 Va. 73); see (3), (d), above. (4 Min. Inst., 622-3.)

(f) *Where cause of action accrued elsewhere.*—Upon a contract made and to be performed in another state or county by one then resident therein, no action is maintainable after the same is barred either there or here (Code, § 5825). But where one resides in another state and makes a contract there to be performed here, or makes it here to be performed there, or makes in one state to be performed in another, the case is still controlled by the common law, which makes the “*lex fori*”, or the law of the place whose court has jurisdiction control. (2 Rand. 303; 76 Va. 772; 4 Min. Inst. 614.)

(g) *Where suit fails for certain causes.*—Where an action or suit, commenced in due time, in the name of or against several, abate as to one of them, by the return of “no inhabitant,” or by death or marriage; or if the judgment or decree

be arrested or reversed, without precluding a new action or suit; or if there was a loss or destruction of any of the papers or records,—a new suit may be brought within one year after such abatement, or such arrest or reversal of judgment or decree, or such loss or destruction. (Code, § 5826.)

Dismissal on demurrer or for want of formality, or for want of jurisdiction, is not within this statute (2 Munf. 511; 4 Munf. 181).

(h) *Where limitation is repealed.*—"If after a right of action or remedy is barred by a statute of limitations, the statute be repealed, the bar is not thereby removed." (Code, § 5828).

(5) *State not within statute of limitations*,—except "agencies of the State incorporated for charitable or educational purposes." (Code, § 5829.)

(6) *Effect of Code 1919 as to existing rights and remedies.*—See § 5830.

LIS PENDENS

§ 1. What it is; must be recorded

§ 2. Forms under "Lis Pendens"

§ 1. **What it is; must be recorded.**—A *lis pendens* (literally, pending suit) is a lien which a party to a suit has on the property involved in the litigation, as against purchasers and creditors. But by statute (§§ 6469, 5186, 3393 (as amended by Acts 1920, p. 213), no *lis pendens* shall bind or affect a subsequent *bona fide* purchaser of real or personal estate for valuable consideration and without actual notice, until and except from the time a memorandum thereof, authenticated by the clerk is recorded and indexed in a "Deed Book" or "Hand Record." The statute does not require recordation as to lien creditors, with or without notice, nor as to prior purchasers, nor as to purchasers without consideration (as, gifts by deed or will).

§ 2. **Forms under "Lis Pendens."**—

No. 1. MEMORANDUM OF LIS PENDENS

Code, §§ 6469, 3393 (as amended by Acts 1920, p. 313); P's
Code Biennial 1920, p. 319.

I, ———, complainant in the suit hereinafter mentioned, do hereby file in the clerk's office of the ——— court of the ——— of ———, Virginia, this memorandum, of *lis pendens* bearing date on the ——— day of ———, 192—, for admission to record in said clerk's office:

- (1). The title of the cause is C. C. vs. D. D.
- (2). The general object thereof is ———
- (3). The cause is pending in the ——— court of the ——— of ———, Virginia.
- (4). The amount of the claim asserted by the plaintiff is ———
- (5). The description of the property is as follows: ———
- (6). The name of the person whose property is intended to be affected is D. D.

Given under my hand, this ——— day of ———, 192—.

Add an acknowledgment, and the following "authentication":

I, ———, clerk of the ——— court of the ——— of ———, Virginia, pursuant to section 6469 of the Code of Virginia 1919 and acts amendatory thereof, do hereby authenticate the foregoing memorandum of *lis pendens*, and do hereby certify that on the ——— day of ———, 192—, suit was instituted and is now pending by C. C. against D. D., in the said court, whose title, general object, amount of claim asserted, description of the property affected, as well as the name of the person whose property is intended to be affected, are as above set forth in said memorandum.

—————, Clerk.

LOANS NOT OVER \$300

(Acts 1918, p. 662 as amended by Acts 1922.)

See *Banks and Banking; Building and Loan and Industrial Loan Associations; Credit Unions; Interest and Usury.*

- § 1. Purpose of act
- § 2. License, bond and place of business
- § 3. Official investigation of loans, examinations of books, papers, etc.
- § 4. False or deceptive advertisements prohibited
- § 5. Maximum interest charge; collection of interest regulated, and what charges prohibited; what may be reimbursed

- (a) Loan void for excess charges
- (b) Debt limited to \$300 principal
- § 6. Requirements of licensee in making loans
 - (a) Each obligation to state amount and terms of loan
 - (b) Statement of loan to be delivered borrower; what particulars to contain
 - (c) Receipts for payments as made
 - (d) Upon repayment obligations to be cancelled and surrendered with security pledged; mortgage to be satisfied; payment of surplus on foreclosure
- § 7. Restrictions of obligations to be taken; what obligations or securities shall state; no instrument to contain unfilled blanks
- § 8. Restrictions of assignments of salary or wages; power of attorney forbidden; when written assent of wife required
- § 9. Penalties for violation of section 1, 7, 13 and 14
- § 10. License not required by banks, trust companies, and building and loan associations
- § 11. Citation of the act, or short title
- § 12. How act to be interpreted; uniformly with other States
- § 13. Section 81 of Tax Bill (as to loans on household goods, etc.) and conflicting act repealed

§ 1. **Purpose of act.**—See the preamble for a justifiable excoriation of the “loan shark.”

§ 2. **License, bond, and place of business.**—For the business of loaning not over \$300, a license must first be obtained from the Chief Examiner of the banking division of the State Corporation Commission, and it must be conspicuously posted in the place of business, together with section 14 of the Act, or such part thereof, as may be furnished by the Chief Examiner. The annual license fee is \$100, with proportionate abatement for less than a year.

The applicant must also give a bond for \$1,000, with some authorized surety company as surety.

The license may be revoked for any violation of the act.

Business is to be conducted under only one name and at one place of business. The name must not hereafter use the words “savings”, “trust”, “bank”, “banker”, “banking”, “investment”, or “building and loan”; but must use the words “small loan,” which must not be used with “or,” or disjunctively. A change of the place of business must have attached to the license the approval of the Chief Examiner. (Acts 1918, p. 662, §§ 1-9, 18, as amended by Acts 1922.)

§ 3. **Official investigation of loans, examination of**

books, papers, etc.—(Id., §§ 10-11, as amended by Acts 1922.)

§ 4. False or deceptive advertisements prohibited.—It is made unlawful to “print, publish or distribute, or cause to be printed, published or distributed in any manner whatsoever, any written or printed statement with regard to the rates, terms or conditions for the lending of money, credit, goods, or things in action in amounts of \$300 or less, which is false or calculated to deceive.” (Id., § 13, as amended by Acts 1922.)

§ 5. Maximum interest charge; collection of interest regulated, and what charges prohibited; what may be reimbursed.—By section 14 of Act, as amended by Acts 1922: “Every person, co-partnership or corporation licensed hereunder may lend any sum of money not exceeding in amount the sum of \$300 and may charge, contract for, and receive thereon interest at a rate not to exceed $3\frac{1}{2}$ per centum per month. Interest shall not be payable in advance or compounded, and shall be computed on unpaid daily balances. In addition to the interest herein provided for, no further or other charge or amount whatsoever for any examination service, brokerage, commission, fine, notarial fee or other things or otherwise shall be directly, indirectly, charged, contracted for, or received, except the lawful fees, if any, actually and necessarily paid out by the licensee to any public officer for filing or recording in any public office any instrument securing the loan, which fees may be collected when the loan is made or at any time thereafter, provided, however, that all notarial fees, including those for acknowledgments to deeds and other papers for recordation shall be at the expense of the lender, and under no circumstances shall the borrower be required to pay any notarial fee whatsoever.

“(a) *Loan void for excess charges.*—If interest or charges in excess of those permitted by this act shall be charged, contracted for or received, the contract or loan shall be void, and the licensee shall have no right to collect or receive any principal, interest or charges whatsoever.

“(b) *Debt limited to \$300 principal.*—No person as principal shall owe any licensee at any time more than three hundred dollars (\$300) exclusive of interest.”

§ 6. Requirements of licensee in making loans.—

“(a) *Each obligation to state amount and terms of loan.*—Every licensee shall state in every note, mortgage, assignment of wages, or other evidence of indebtedness the date of its execution, the amount of money actually lent, the compensation to be paid for interest, and the dates and amounts of repayment agreed upon and the place where payable.

“(b) *Statement of loan to be delivered borrower; what particulars to contain.*—Every licensee shall deliver to the borrower, at the time a loan is made, a pass book, or card stating in the English language in clear and distinct terms the date, amount and compensation for interest, and dates and amounts of repayments agreed upon, the nature of the security if any; also the names and addresses of both borrower and licensee. On the back of such pass book, or card, there shall be printed in English a copy of section fourteen (14) of this act, in type not smaller than eight point (brevier).

“(c) *Receipts for payments as made.*—Every licensee shall enter in such pass book, or card, or give to the borrower a plain and complete receipt for all payments made on account of any such loan, at the time such payments are made, and show the amount of balance due.

“(d) *Upon repayment, obligations to be cancelled and surrendered with security pledged; mortgages to be satisfied; payment of surplus on foreclosure.*—Every licensee shall, upon repayment of the loan in full, mark indelibly every obligation signed by the borrower with the word ‘paid’ or ‘cancelled’ and release any mortgage, cancel and return any note and any assignment given as security, and surrender any personal property, if pledged by the borrower. In the event of collection by foreclosure sale or otherwise, any surplus arising after the payment of the expenses of collection, sale or foreclosure and satisfaction of the debt, shall be paid and returned to the borrower or whomsoever is entitled to the same.” (Acts 1918, p. 662, § 15, as amended by Acts 1922.)

§ 7. Restriction of obligations to be taken; what obligations or securities shall state; no instrument to contain unfilled blanks.—“No licensee shall take any confession of judgment or any power of attorney; nor shall any licensee take any note, promise to pay, or security which does not state the actual amount of the loan, the time for which it is made, and

the rate of interest charged; nor shall any licensee take any instrument in which the blanks are left to be filled in after execution." (Id., § 16, as amended by Acts 1922.)

§ 8. Restrictions of assignments of salary or wages; power of attorney forbidden; when written assent of wife required.—"No assignment of or order for the payment of any salary, wages, commissions or other compensation for services earned or to be earned, given to the licensee to secure a loan shall be valid unless such loan is contracted simultaneously with its execution, nor shall any such assignment or order or any chattel mortgage, or other lien on household furniture then in the possession and use of the borrower be valid unless in writing signed in person by the borrower and not by an attorney, nor if the borrower is married, unless signed in person and not by attorney by both husband and wife, provided that written assent of a spouse shall not be required where the husband and wife have been living separate and apart for a period of at least five months prior to such assignment, order, mortgage or lien.

"(a) Collection of salary or wages under assignment restricted to ten per centum installments; regulations, notice to employer.—When collections under assignment of salary or wages, as herein provided for, is enforced by judgment or otherwise made or enforced, said collection shall be in installments from said salary or wages at such times as the same shall become due and payable by the employer, and no installment so collected shall exceed ten per centum of the amount of such salary or wages due the assignor at the time collection is made; nor shall any such assignment be valid as against the employer except, and from the time a copy thereof, verified by the oath of the licensee or his agent together with a statement of the amount unpaid upon such loan, is served upon the employer." (Id., § 17, as amended by Acts 1922.)

§ 9. Penalties for violation of this act.—"Any person, co-partnership or corporation and the several officers and employees thereof who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof, shall be punishable by a fine of not more than \$500 or by imprisonment of not more than six months, or by both such fine and imprisonment in the discretion of the court.

"(a) *Rate of interest.*—No loan for which a greater rate of interest, or charge than is allowed by this act, has been contracted for or received, wherever made, shall be enforced in this State and any person in anywise participating therein in this State shall be subject to the provisions of sections 1, 14 (a), and 18 of this act." (Id., § 18, as amended by Acts 1922.)

§ 10. License not required by banks, trust companies and building and loan associations.—"No license shall be required under this act for loan transactions of any person, co-partnership, corporation, bank, or association doing business under any law relating to banks, trust companies, building and loan associations and licensed pawnbrokers of this State, or of the United States, as they are already regulated by appropriate laws. Nor shall a license be required of loan transactions of any corporations which make loans at a rate not exceeding the conventional interest rate per annum, and which require the borrower to purchase certificate of investment equal in amount to the sum borrowed, and to pay therefor in uniform weekly installments of not less than fifty weeks; nor shall this act apply to loans for which real estate security is given, if said security is evidenced by mortgage or deed of trust.

"(a) No person, co-partnership, or corporation, except as authorized by this act shall, directly or indirectly, charge, contract for, or receive any interest, or consideration greater than the legal contract rate per centum per annum upon the loan, use, or forbearance of money, goods, or things in action or upon the loan, use, or sale of credit, of the amount or value of \$300 or less. The foregoing prohibition shall apply to any person who, as security for any such loan, use or forbearance of money, goods or things in action or for any such loan, use or sale of credit, make a pretended purchase of property, salary or wages from any person and permits the owner or pledgor to retain possession thereof or who by any device or pretense of charging for his services or otherwise, seeks to obtain a greater compensation than is authorized by this act." (Id., § 19 as amended by Acts 1922.)

§ 11. Citation of the act, or short title.—"This act may be cited as the uniform small loan law." (Id., § 20, as

§ 12. How act is to be interpreted; uniformly with other

States.—"This act shall be so interpreted and construed so as to effectuate its general remedial purposes and to make uniform laws of those States which enact it." (Id., § 20 (a), as amended by Acts 1922.)

§ 13. Section 81 of Tax Bill (as to loans on household goods, etc.) and conflicting Acts repealed.—(Id., § 21, as amended by Acts 1922.)

LOBBYING

Paying or receiving compensation to secure the passage or defeat of a measure by the General Assembly, or employing paid agents to give information to be used for such purpose, is punishable by jail not over 12 months and fine not over \$5,000; but this does not apply to persons invited or permitted to appear before a regular or special committee. (Code, §§ 4499-4501. The statute applies to the use of money for bribery and corruption, debauching the members, or buying votes, and not to contracts with attorneys for purely professional services, such as drafting petitions, setting forth client's claim, taking testimony, collecting facts, preparing or making arguments, oral or written, addresses to the legislature or its committee, with intention to reach its reason by argument (80 Va. 475).

LOSS OF RECORDS OR PAPERS

For how court may proceed, when original papers lost or destroyed; plaintiff may commence new suit; when certified copy of a paper, required to be recorded, may be used as evidence; and for actions at law on lost evidence of debt, the plaintiff giving indemnifying bond, see Code, §§ 6241-2; see Burks' Pl. & Pr., § 315.

MAIMING OR MAYHEM

- § 1. Definition; civil and criminal wrong
- § 2. Maiming as a criminal offense
- § 3. Form of "description" in warrant or indictment.

§ 1. **Definition; civil and criminal wrong.**—Mayhem, or maiming, at common law, is such a hurt of any part of a man's body whereby he is rendered less able in fighting to defend himself, or to annoy his adversary—e. g., cutting off, disabling, or weakening his leg, arm, hand, or finger, or striking out his eye or foretooth, or depriving him of those parts which in all animals abate their courage. But cutting off his ear, nose or lip, or knocking out his jaw teeth, are not mayhems at common law, for they merely disfigure, and do not weaken so as to make one less able in fighting. (H's G. & M., p. 124.)

Maiming is both a civil injury for which damages may be recovered, and a criminal offense.

§ 2. **Maiming as a criminal offense.**—By section 4402 of the Code: "If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be punished by confinement in the penitentiary not less than one nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall, in the discretion of the jury, be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding \$500."

Our Virginia statute not only embraces such acts as constituted mayhem proper, at common law, but also embraces acts of similar character, though they do not tend to weaken, but merely to disfigure. And the offense under the statute is graded as either malicious, or unlawful maiming.

(1) *Shooting.*—The gun may be loaded with any destructive material which will endanger life, even with paper, but it must be so charged with powder, or other explosive material, as to be capable of doing damage. Could the offense be committed by the use of any other explosive material besides gunpowder—e. g., gun-cotton? or, if charged only

with condensed air? Mr. Minor says "it would seem that it could."

(2) *Stabbing*.—Stabbing is making a wound with a pointed instrument.

(3) *Cutting*.—Cutting is wounding with a sharp-edged instrument.

(4) *Wounding*.—Wounding is often defined as "the breaking of the true skin, whether with a sharp or blunt instrument," but not bruising, nor breaking bones nor biting off the nose or a finger, the law contemplating the use of an instrument other than the teeth. The medical definition of a wound, however, which the law now adopts, is, "a recent solution of continuity in the soft parts."

(5) *Bodily injury*.—Bodily injury comprehends, it would seem, any bodily hurt whatever. The English statute has it "grievous bodily hurt," which includes such injuries only as may endanger life.

(6) *Malice*.—Malice must exist in malicious maiming as it does in murder, and is proved in like manner; so whenever, had death ensued, it would have been murder, if death does not ensue, it is malicious maiming.

(7) *Intent*.—The intent in doing any of the acts mentioned in the statute must be one or the other of the intents specified therein—i. e., with intent either to maim, disfigure, disable, or kill—for it is by uniting one or the other of these intents with one or the other of the acts that the offense is consummated.

"On any indictment for maliciously shooting, stabbing, cutting, or wounding a person, or by any means causing him bodily injury, with intent to kill him, the jury may find the accused not guilty of the offense charged, but guilty of maliciously doing such act with intent to maim, disfigure or disable, or of unlawfully doing it with intent to maim, disfigure, disable, or kill such person." (Code, § 4920.)

But all these intents may be averred conjunctively in the same warrant or indictment, so as to reach the proof upon any one of them, and it will be sufficient to prove either of the purposes. Nor need the intent be conceived against the person struck, if it was aimed at another. And intent will be presumed from such being the probable consequence. (See 122 Va. 826.)

(8) *Distinction between malicious and unlawful maiming.*—Malicious and unlawful maiming, as comprised in section 4402, differ only by the presence of malice in the one case and the want of it in the other. In malicious maiming, malice exists and is proved as in murder; so that whenever, had death ensued, it would have been murder, if death does not ensue, it is malicious maiming: while in unlawful maiming, malice is wanting; so that whenever, had death resulted, the offense would have been manslaughter, if death does not ensue, it is unlawful maiming, as, for instance, when the act is done in heat of blood or in mutual combat, or results from the negligent performance of a lawful act, or as an incident to the prosecution of an unlawful act. Unlawful maiming, as defined by section 4403, differs from unlawful maiming of section 4402 only in the fact that in the one case the act is done with "intent to maim, disfigure, disable, or kill, while in the other case the act is done 'in the commission of' or attempt to commit a felony." (H's G. & M. pp. 124-7.)

§ 3. Form "of description" in warrant or indictment.

NO. 1. WARRANT OF ARREST FOR UNLAWFUL OR MALICIOUS SHOOTING, STABBING, CUTTING, OR WOUNDING A PERSON

(Code, § 4402.)

DESCRIPTION:

"unlawfully, maliciously, and feloniously did shoot (or *stab, cut, or wound*) one E. F., with intent to maim, disfigure, disable, and kill him the said E. F."

The above warrant and the one following are drawn for both unlawful *and* malicious maiming, and a conviction may be had under them for *either* offense.

NO. 2. INDICTMENT FOR UNLAWFULLY OR MALICIOUSLY SHOOTING A PERSON

(Code, §§ 4402, 4920.)

DESCRIPTION:

"with a certain gun then and there loaded with gunpowder and leaden shot, unlawfully, maliciously, and feloniously, did shoot one E. F., with intent him the said E. F., then and there to maim, disfigure, disable, and kill."

NO. 3. INDICTMENT FOR UNLAWFULLY OR MALICIOUSLY STABBING,
WOUNDING, OR CUTTING A PERSON

(*Idem.*)

DESCRIPTION:

"In and upon one E. F., did make an assault, and him the said E. F., unlawfully and feloniously did stab (or cut or wound), with intent him the said E. F., then and there to maim, disfigure, disable, and kill."

MAINTENANCE AND CHAMPERTY

- § 1. Definition
- § 2. Punishment

§ 1. **Definition.**—These offenses are common law misdemeanors, and are defined as follows:

(1) *Maintenance* is a malicious or at least officious intermeddling in a suit in which the offender has no interest, by assisting one of the parties to it against the other, with money or advice, to prosecute or defend the action without any authority of law; but a man may with impunity maintain the suit of his kinsman, servant, tenant, or poor neighbor, out of charity and compassion; and an attorney may even advance money to carry on a cause, to be repaid, but his assistance must be strictly professional, and not by deceitful practice.

(2) *Champerty* is a species of maintenance, and is a bargain with the plaintiff or defendant to divide the land or other subjects of disputes between them if they prevail, whereupon the champertor is to carry on the suit at his own expense. For "common barratry," see *Nuisance*, section 3. (H's G. & M., p. 368.)

§ 2. **Punishment.**—They are punishable by a fine not over \$500, or jail not over 12 months, or both. (Code, § 4782.)

MALICIOUS PROSECUTION

(See "Burks' Pleading & Practice" (new ed.), same title.)
See *Assault and Battery*

- § 1. Definition
- § 2. Malicious prosecutions in criminal cases
 - (1) Falsity of the charge
 - (2) Want of probable cause
 - (3) Malice in the prosecutor
 - (4) Damage to the accused
- § 3. Malicious prosecutions in civil cases

§ 1. **Definition.**—A malicious prosecution is a prosecution of one in a criminal or civil case, without probable cause therefor; as, in the case of malicious arrests, indictments or search warrants; or malicious attachments, civil arrests, or proceedings in involuntary bankruptcy. (4 Min. Inst., 477, 482.)

§ 2. **Malicious prosecutions in criminal cases.**—To constitute a malicious criminal prosecution four things must concur:

(1) *Falsity of the charge.*—This must be established by a verdict or the decision of the court in which instituted; or by the proceedings having been otherwise legally ended. Even an acquittal on a defect in the indictment is sufficient. The defendant must be fully acquitted; a *nolle prosequi*, or dismissal by the Commonwealth's Attorney, is not sufficient (28 Grat. 898).

(2) *Want of probable cause.*—This is the gist of the action. Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime. A J. P. judgment of conviction, unreversed, is conclusive evidence of probable cause; and even though reversed, it is *prima facie*, if not conclusive evidence, of probable cause. The question of probable cause is a mixed question of law and fact.

(3) *Malice in the prosecutor.*—Want of probable cause shows malice; but it cannot be inferred from the quashing of the indictment, or the plaintiff's acquittal for the prosecutor's failure to appear against him, or from the indictment being returned "not a true bill"; but there must be extrinsic proof in these and like cases, of the want of probable cause. Even

though malice be shown, the defendant can defeat liability by showing probable cause.

(4) *Damage to the accused.*—It is sufficient to prove damage to the person by imprisonment, or to the reputation by scandal, or to the property by expense. (4 Min. Inst., 477-82.)

§ 3. *Malicious prosecutions in civil cases.*—To constitute a malicious prosecution in a civil case, there must be falsehood in the demand (in whole or in part), want of probable cause, malice, and damage, as in criminal cases, and the same principles apply in both classes of cases. (4 Min. Inst., 482-7.)

MANDAMUS

(See "Burks' Pleading & Practice" (new ed.).)

- § 1. Definition
- § 2. Cases where used
- § 3. Statutory provisions

§ 1. *Definition.*—Madamus is a writ or proceeding to compel an inferior court or officer to do some purely ministerial act or duty required by law, or to hear and decide a case (but leaving his discretion free in making his decision), in cases where there is no other adequate remedy. (11 Grat. 655, 663-4; 22 Grat. 458; 23 Grat. 584; 25 Grat. 817.)

§ 2. *Cases where used.*—The common law determines the instances, in most cases, where mandamus lies. The writ has been awarded in Virginia: (1) To compel a court to admit a deed to be proved and recorded; (2) to restore a court clerk ousted from office by the illegal appointment of another; (3) to compel a justice of the peace to allow an appeal where the party has a right to it; (4) to compel the court to do what the law requires touching sales of land for taxes; (5) to compel a judge to sign a bill of exceptions; (6) to compel a flour inspector to inspect flour according to law by boring into the head of the barrel with an augur of a certain dimension; (7) to compel a judge to hear and decide a cause which the law requires him to do; (8) to compel an inferior court to enter

up a judgment already pronounced; (9) to compel a court to reinstate a cause erroneously dismissed; (10) to compel the payment of a public officer's salary; (11) to compel the keeper of the rolls to have a bill, which in the court's opinion has become a law, printed and published with the other Acts of Assembly, and to furnish a copy duly certified to any one interested who shall demand it, or to omit from the rolls any act which the court has decided is not law; (12) to compel a register to allow any citizen to inspect and take copies of the registration books containing lists of voters; (13) to compel the superintendent of a lunatic asylum to effectuate a discharge of a lunatic; (14) to compel a judge to sign a bill of exceptions.

For instances where authorized by statute see section 3, below.

The writ has been denied in the following cases: (1) to compel circuit court to award a supersedeas to a judgment of a county court; (2) to compel the visitors of a charitable institution to compel the restoration of an officer; (3) to compel the county court to nominate any particular justice for sheriff, or to open a new road, or to levy a tax to pay for a county bridge; (4) to compel the doing of any vain thing; (5) to compel the admitting a person to be a party to a suit (84 Va. 34); (6) to compel the board of supervisors to levy a tax to pay a judgment it has no authority to pay (86 Va. 163); (7) generally where there is some other adequate remedy, or the writ would infringe upon the discretion conferred by law upon the court, officer, or other functionary. (4 Min. Inst. 398-401.)

§ 3. Statutory provisions.—See Code, §§ 5831-40. Mandamus lies on behalf of any citizen to compel a city council to perform its legal duty (Va. Const., § 121); from the Court of Appeals to the State Corporation Commission (Va. Const., § 156); to enforce judgment, in proceeding by railroad or canal company for relief from erroneous assessment, (Va. Const., § 180); to enforce law relating to primary elections (Code, § 224); to compel officers to adopt system of accounting (Code, § 555); to enforce payment of bonds against drainage district (Code, § 1774, as amended by Acts 1920, p. 607); to compel obedience to order of board of health against a city or town (Code, § 1794); to establish roads and bridges between coun-

deadly weapon, or with a manifest intention to kill, or to do some great bodily harm. (H's G. & M., p. 97.)

(5) *Doctrine as to cooling time of passion.*—How great soever the provocation, if sufficient time has elapsed for passion to subdue and reason to interpose, the killing is murder. In all possible cases, whatever the provocation, deliberate homicide upon a principle of revenge, is murder; for no man is to be his own avenger. If the laws afford an adequate remedy, he must seek it of them; but if not, he must bear his lot with patience, and remember God says, "vengeance is mine; I will repay." Whether there has been cooling time is eminently a question of fact, varying with the particular case and the condition of the party. But the act must be imputable to human infirmity only, and not to deliberate purpose and malignity of heart. Any diversion of the mind to other thoughts of business, or any circumstances showing deliberation or reflection, as well as mere lapse of time, repel the idea of passion, and killing after the lapse of twenty-four hours (and probably after a much shorter time) is to be ascribed to malice and not to passion, and so is murder, no matter how great the provocation. (H's G. & M., pp. 97-98.)

(6) *When mutual combat extenuates homicide.*—Mutual combat, not premeditated, extenuates homicide to manslaughter on the principle that the blood is heated by the fight, which, concurring with the instinct of self-preservation, silences the voice of reason. The circumstances of mutual combat required to extenuate homicide to manslaughter are: (1) The combat must be on a sudden occasion, and in heat of blood. It matters not who draws or strikes first, if the occasion is sudden, and be not used as a cloak for pre-existing malice; (2) combat must not be by previous agreement, at least not at such interval after the provocation as should have cooled the passion; (3) party slain must have been on an equal footing in point of defense, at least at the outset. But if, having been on equal footing at first, after they are heated with the contest, one kills the other with a deadly weapon, it is still only manslaughter. (H's G. & M., p. 98.)

(7) *As to third persons interfering in combat.*—(1)

Where the third person's purpose is to separate the combatants, and he announces it—if he kills in order to preserve his own life and that of one of the combatants, it is justifiable; if in the heat of passion engendered by the contest, it is manslaughter; if he is killed, it is murder. But (2) where the third person's purpose is to take part, or he does not notify his purpose to separate the combatants, whether killing or killed, the same principles seem to be, in general, applicable as are to the parties originally engaged in mutual combat. (H's G. & M., p. 99.)

§ 2. Involuntary manslaughter; how punished.—"Involuntary manslaughter shall be punished by confinement in the penitentiary not less than one nor more than five years; or, in the discretion of the jury, by a fine of not exceeding \$1,000, or confinement in jail not exceeding one year or both." (Code, § 4397.)

(1) *Definition of involuntary manslaughter.*—Involuntary manslaughter is the killing of one accidentally, contrary to the intention of the party: (1) In the prosecution of some unlawful but not felonious act; (2) in the improper performance of a lawful act.

(2) *Instances of involuntary manslaughter.*

(a) *Instances of killing contrary to intention, in the prosecution of an act unlawful but not felonious nor done with mischievous design.*—Shooting at the cattle of another wantonly, but with no intent to steal, and accidentally killing a man; (2) killing accidentally, in sports unlawful or productive of danger or riot—e. g., prize-fightings, public boxing matches, cock-fighting, &c.; (3) killing accidentally, by riding an unruly horse into a crowd, throwing a stone over a wall into the street, firing a gun into the street, &c., the act being done incautiously and heedlessly, for if done wilfully it is murder; (4) killing by a vicious animal, known to be dangerous (e. g., an ox) negligently allowed to go at large, but if let out purposely, though only to frighten, the killing is murder; (5) killing accidentally, in the incautious and negligent use of fire-arms, without mischievous intent; (6) killing contrary to intention, with an instrument not likely to produce death, in sudden heat of passion, on a provocation not sufficient to reduce homicide to

manslaughter—e. g., when a blow with one's hand, or a small stick, contrary to any reasonable expectation, proves fatal; but if the manner of inflicting the blows be cruel and unusual, and they exceed in number and violence what is necessary to repel the attack, although only the fists and feet be used, if death ensue, it is voluntary manslaughter at least, and may be murder.

(b) *Instances of killing contrary to intention in the performance of a lawful act in an improper manner or without due caution.*—(1) Killing without mischievous intent, by workmen throwing stones or timber, &c., from a house, where there are few passersby, without warning, or in a populous city, with warning; but in the country, however, where there is small probability of persons passing, even without warning, killing would be excused as by misadventure; (2) killing without mischievous intent, by driving a carriage or steering a vessel carelessly; but if the driver sees the danger, and yet wilfully and recklessly drives on, it is murder; (3) killing without intending, by immoderate correction, by one having authority to inflict chastisement—e. g., parents, masters of apprentice, &c.; the intention is determined by the degree, manner, and instrument of the chastisement, as compared with the age and strength of the party; if done in a manner, &c.; not likely to kill or to inflict serious injury, it is involuntary manslaughter, otherwise it may be murder; (4) killing by gross ignorance, rashness, or neglect of medical practitioners—this is manslaughter; (5) killing by reason of neglect or omission of a plain personal duty—e. g., failing to provide shelter and other necessities for a wife, infant child, or apprentice, or to take proper precautions for safety in the conduct of a dangerous business—this is certainly manslaughter, and may be murder; (6) killing by officers of justice without sufficient necessity. They are required to execute their duties in a proper and legal manner, notwithstanding and despite of any resistance which may be made; but they should not come to extremities upon every slight interruption of their proceedings, nor without a reasonable necessity. Killing where such reasonable necessity does not exist may be murder, but if the provocation be such as to extenuate it, it is at least manslaughter. (H's G. & M., pp. 99-101.)

§ 3. Forms of warrant and indictment.—See under *Murder*.

MARRIAGE

See *Alimony; Minors, etc.; Curtesy; Divorce; Dower; Parent and Child*.

- § 1. What constitutes marriage in Virginia
- § 2. Disabilities which render a marriage void
 - (1) Prior marriage still subsisting
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 - (3) Different races
- § 3. Impediments which render a marriage voidable
 - (1) Natural or incurable impotency of body
 - (2) Prohibited degrees of relationship
 - (3) Want of reason
 - (4) Conviction of infamous offense before marriage
 - (5) Pregnancy of wife at time of marriage
 - (6) Prostitution of the wife prior to the marriage
 - (7) Fraud or force
- § 4. How marriage effected in Virginia, and other statutory provisions
- § 5. Effect of marriages out of State
- § 6. Proof of marriage
- § 7. Contracts to marry and breaches thereof
- § 8. Deed of separation of husband and wife
- § 9. Marriage settlements

§ 1. What constitutes marriage in Virginia.—At common law, a marriage is an agreement made in the present tense, without cohabitation, or by words in the future tense, followed by consummation, between a man and a woman, to become husband and wife; but, in Virginia, such "common law marriage" is void (100 Va. 250). A license is absolutely necessary (Code, § 5071); but while the marriage is to be celebrated by a minister or other person authorized by law (Code, § 5079), yet the marriage is not to be deemed or declared void for want of authority in the celebrant, or for any deceit, omission, or imperfection in the license, if either party *bona fide* believe that he or she was entering into a lawful marriage (Code, § 5082).

§ 2. Disabilities which render a marriage void.—The following disabilities render a marriage absolutely void, in Virginia, without any decree of divorce; but either party may, as is preferable, have the marriage annulled by decree of court, except a person of age marrying a person under age, cannot do so, though the latter may (Code, §§ 5100-1):

(1) *Prior marriage still subsisting.*—See Code, § 5087. Such second marriage is bigamy (Code, § 4538); but otherwise, if the former spouse had been continuously absent for seven years and not known to be living within that time, or if the second marriage was contracted in good faith under a reasonable belief that the former consort was dead, or the former marriage was either absolutely void, or dissolved by decree of court (although the term at which entered has not ended)—see Code, § 4539; and it should be here noted that where the marriage is dissolved for any cause arising subsequent to the date of the marriage, neither party is allowed to marry again for six months after the date of the decree, and the marriage is not considered dissolved as to any subsequent marriage, or a prosecution therefor, until the expiration of the six months—Code, § 5113.

(2) *Want of age.*—The age of consent is 14 in males and 12 in females. Where either party is under the age of consent, if they separate during such non-age and do not cohabit afterwards, the marriage is void (Code, § 5090); but where one only is of age, he cannot, though the other may, sue to annul the marriage (Code, § 5101).

(3) *Different races.*—“All marriages between a white person and a colored person shall be absolutely void” (Code, §§ 5087, 5089), both parties being also punishable by penitentiary from 2 to 5 years (Code, § 4546). A colored person is one having one-sixteenth or more of negro blood (Code, § 67).

§ 3. Impediments which render a marriage voidable.—There are in Virginia seven impediments existing at the time of marriage, which render it voidable by a decree of court, as follows:

(1) *Natural or incurable impotency of body.*—If this exists at the time of marriage, a divorce may be decreed (Code, § 5103). Impotence is inability to copulate or have

sexual intercourse; ability to get or have children is not the test, as is commonly thought, though the latter may be the consequence of the former, but impotency and sterility are not synonymous terms. The impotency may have existed at birth or been caused by disease or accident afterwards. Impotency arising after marriage is no ground for annulment of marriage. Section 5088 also assigns as cause for annulment, where either party was at the time incapable from physical causes of entering into the marriage state."

(2) *Prohibited degrees of relationship.*—Marriages which are prohibited by law on account of "consanguinity" (i. e., relationship by blood) or "affinity," (i. e., relationship by marriage), in the cases enumerated in sections 5084-6 of the Code, may be annulled by decree of court, or conviction under section 4540 of the Code for marrying within the prohibited degrees (Code, §§ 5088-9). Among the close relationships now permitted in marriage are a wife's or husband's sister or brother, a brother's or sister's widow or widower, or the widow or widower of his brother's or sister's son or daughter, or his uncle's or aunt's widow or widower.

(3) *Want of reason.*—Where either party was insane at the time of the marriage, it may be annulled (Code, § 5088); and by recent act (Acts 1918, p. 473), no woman under 45, or any man of any age except he marry a woman over 45, either of whom is a habitual criminal, idiot, imbecile, hereditary epileptic, or insane person, nor any person of any age, who is afflicted with any contagious venereal disease, shall marry.

(4) *Conviction of infamous offense before marriage.*—The marriage may be annulled, "where prior to the marriage, either party without the knowledge of the other, had been convicted of an infamous offense," provided they do not live together as husband and wife after knowledge of the fact (Code, § 5108). An "infamous offense" is any felony (i. e., any offense that may be punished by death or confinement in the penitentiary), perjury or procuring it, bribing witnesses, conspiracy to accuse one of crime or to procure the absence of a witness, and the like (1 Minor, 264).

(5) *Pregnancy of wife at time of marriage.*—Where this was without the knowledge of the husband by some per-

son other than himself, the marriage may be annulled, provided the husband has not cohabited with his wife after knowledge of the fact (Code, § 5103).

(6) *Prostitution of the wife prior to the marriage.*—Where this was without the knowledge of the husband, a divorce may be decreed to the husband, provided he does not cohabit with his wife after knowledge of the fact (Code, § 5103). Prostitution is promiscuous and indiscriminate sexual intercourse, not with one, but many persons. For causes for divorce arising subsequent to marriage, see title *Divorce*.

(7) *Fraud or force.*—Like other contracts, marriage may be annulled for fraud or force, but only frauds as to the identity of the parties, frauds as to fortune, station, health, etc., not being sufficient. (1 Minor, 288-9.)

§ 4. How marriage effected in Virginia, and other statutory provisions.—A marriage is effected by a license issued by the clerk of the court or his deputy, or, if they be not able to do so, then by the judge, of the county or city where the female usually resides, or where the marriage is to be solemnized, if she is a non-resident (Code, § 5072). A statistical statement is obtained by the clerk and recorded (Code, § 5074); and an abstract thereof and of the minister's certificate are entered in the "Marriage Register," while the license and certificate are filed and indexed by names (Code, §§ 5074-5). If the marriage is out of the State, and either party is a resident, a sworn certificate by someone present may be returned to the clerk, and an abstract thereof recorded (Code, § 5077).

If the clerk knowingly issue the license contrary to law, he is jailed not over one year and fined not over \$500 (Code, § 4541); for failure of any other duty, he forfeits \$10 (Code, § 5094).

If either party be under 21 years, and not before married, the consent of the father or guardian, or, if there be none, of the mother, of such person is required, either personally, or in writing subscribed by a witness who makes oath before the clerk or judge that the writing was signed or acknowledged in his presence by the parent or guardian, or the writing may be acknowledged before and certified by a notary or other proper officer; if there be no father, guardian, or mother, the judge may authorize the marriage (Code, § 5078).

The marriage is celebrated by a minister of any religious denomination who qualifies before the court or judge by furnishing proof of his ordination and of his being in regular communion with his religious society, and giving bond, with surety, in penalty of \$500; and where the parties belong to a society that has no ordained minister, the marriage may be solemnized as prescribed in such society (Code, §§ 5079, 5081). Where deemed expedient the court may appoint other persons for the purpose (Code, § 5080).

The marriage fee is \$1.00, and for exacting more there is a forfeiture of \$50 to the party aggrieved (Code, § 5083).

The minister or other person celebrating a marriage must (under penalty of forfeiture of his bond—and a fine of \$10 to \$20) return the license with his certificate thereto within 30 days to the clerk, which being recorded, together with the certificate of statistics above, constitutes the Marriage Register, certified copies from which are *prima facie* evidence of the facts therein stated (Code, §§ 5074, 5092-3, 5098).

Knowingly to perform the ceremony of marriage without a lawful license, or to officiate without lawful authority, is punishable by jail not over one year and fine not over \$500 (Code, § 4542); and to perform the ceremony between a white person and a colored person incurs a forfeiture of \$200, one-half to the informer (Code, § 4547). For provisions as to Bureau of Vital Statistics, see Code, §§ 5095-9, and Acts 1918, p. 397.

§ 5. Effect of marriages out of State.—It is a general rule that a marriage valid where celebrated is valid everywhere, and if invalid by that law it is invalid everywhere, even though the parties leave the State to evade the law; and this doctrine is applicable to the capacity of the parties to contract (as, age, etc.), as to the ceremonies to be observed; and it would seem where a common law marriage is recognized in another State it would be recognized here. The general rule above is subject to the following three exceptions: Where the marriage is within the prohibited degrees of relationship, or is polygamous (Code, §§ 5089, 5084-6); or is between a white person and a negro (Code, § 4540); or subjects resident abroad in commercial establishments, conquered places, barbarous or desert countries, or in countries of a different religion, as

Mohammedan or Pagan, are permitted, by a sort of moral necessity, to contract marriage according to the laws of their home country, and such marriages are valid although not in accordance with the laws where contracted. (1 Minor, 273).

§ 6. Proof of marriage.—In prosecutions for bigamy, and civil actions for adultery, where actual marriage must be shown, it may be proved either by some witness present at the marriage; by the Marriage Register, or copies therefrom, with proof of identity of the parties; or by acknowledgment of the accused or adverse party. (1 Minor, 274.) But in the case of marriages within the prohibited degrees or between a white person and a negro, where the parties leave the State for the purpose and with the intention to return, the fact of their cohabitation here as man and wife is sufficient proof of their marriage (Code, § 4540).

In all civil proceedings, except the action for adultery, cohabitation and general reputation are sufficient evidence of the marriage; and a man who introduces a woman into society as his wife is estopped to deny that she is so, so far as regards his liability for necessities furnished her. (1 Minor, 274.)

§ 7. Contracts to marry and breaches thereof.—The contract to marry must be mutual. It may be shown by the conduct of the parties, as well as by their words and letters; but the contract need not be in writing, the language of section 5561, "agreement made upon consideration of marriage," referring only to marriage settlements; yet if the marriage is to be more than a year off, it must be in writing, under clause 7, of said section. A party under 21, may avoid the contract at pleasure. No precise time for the marriage needs to have been fixed; the law presumes a reasonable and convenient time. If the promise is not kept, a suit for damages is the remedy. The following defenses may be made to such a suit:

(1) Proof of any of the causes which would make the marriage void or voidable—see sections 2 and 3, above.

(2) The unchaste character, or lascivious or lewd conduct of the female towards other men, unknown to the defendant at the time of the engagement, or such conduct afterwards. Evidence of general reputation may prove general bad character, but specific misconduct must be specifically proved.

(3) Consent obtained by false and fraudulent misrepresentations of any material fact as to fortune, station in life, or previous conduct, or, it would seem, of previous condition, as widowed or otherwise, the promise being thereby invalidated, supposing the defendant to have been thereby deceived.

(4) The subsequent mutual release of the promise is also a good defense; and long-continued cessation of intercourse and visits, not otherwise accounted for, tends to prove the defense.

(5) Prior engagement of the plaintiff to another party, fraudulently concealed from the defendant. (1 Minor, 276-7.)

§ 8. Deed of separation of husband and wife.—This is a deed between the husband and wife that they shall live separate, and neither will exact or sue for a restitution of conjugal rights, but the husband provides a stipulated competency for the wife, and he is not to be liable for any debts contracted by her. Such deeds are valid only as to property arrangements, but does not impair or annul any other of the marital rights and obligations. (1 Minor, 312-15.)

§ 9. Marriage settlements.—See *Married Woman's Property and Other Rights*.

§ 10. Form of deed of separation of husband and wife.

No. 1. DEED OF SEPARATION, HUSBAND ALLOWING WIFE ANNUITY

(4 Min. Inst. p. 1609; Tate's Forms, 277.)

This indenture, made this ——— day of ———, in the year of our Lord 192—, between H. H. of ———, of the one part, and C. C., of ———, and W., wife of the said H. H., of the other part: Whereas some unhappy differences have lately arisen between the said H. H. and W., his wife, and they have mutually agreed to live separate and apart from each other, and previous to such separation the said H. H. hath consented thereto, and also proposed and agreed that he, out of his own proper moneys and estate, would allow and pay the said W., during the term of her natural life, for her better support and maintenance, the annuity or yearly sum of ——— dollars, clear of all taxes, charges and deductions whatsoever, payable to her in such manner as hereinafter mentioned; subject nevertheless, to the proviso hereinafter contained, respecting the payment of said annuity. And also, that upon the death of the said W., the said H. H. will pay the personal representative of the said W., besides such arrears of the said

annuity as may be then unpaid, the sum of ——— dollars, towards and for the purpose of defraying the charges of the funeral of the said W. Now, THIS INDENTURE WITNESSETH, that the said H. H., in pursuance of his said proposal and agreement, doth hereby, and for himself and his heirs, covenant and agree with the said C. C., and his assigns, in manner and form following, that is to say: That it shall and it may be lawful for the said W., and that the said H. H. will suffer the said W., at all times henceforth during her natural life, to live separate and apart from him, and to sojourn, be and reside in such place and places, and family and families, and with relations, friends and other persons, and to follow and carry on such trade and business, as she, the said W., from time to time, at her will and pleasure (notwithstanding her coverture, and as if she was a *feme sole* and unmarried, shall think fit. And that of the children born to the said H. H. by the said W., his wife, the said H. H. will suffer ——— to live and remain with the said W., and in her custody and charge, whensoever, as often and as long as the said W. shall think fit. (Insert any other covenants touching the children of the marriage). And that the said H. H. shall not, nor will at any time or times thereafter, sue, molest or trouble the said W. for so living separate and apart from him, or any other person or persons whatsoever for receiving, harboring or entertaining her; nor will, without the consent of the said W., visit her, or knowingly come into any house or place where she shall or may dwell or reside, or be; or send or cause to be sent any letter or message to her, nor shall or will at any time hereafter claim or demand any of the moneys, rings, jewels, plate, clothes, linen, woollen, household goods or stock in trade, which the said W. now hath in her custody, power or possession, or which she shall or may hereafter acquire by purchase, gift, devise, bequest, or other wise, and that she shall and may enjoy and absolutely disposed of the same as if she were a *feme sole* and unmarried. And further, that the said H. H., or his assigns, shall and will pay to the said W., or her assigns, during the term of her natural life, for and towards her better support and maintenance, an annuity or yearly sum of ——— dollars, in gold, free and clear of all charges, taxes, assessments and deductions whatsoever, the said annuity to be payable quarterly, in four equal instalments of ——— dollars each, on the ——— day of the months of ———, ———, ———, and ———, of each and every year during the term aforesaid, is to be in full satisfaction of and for the maintenance and support of the said W., and all alimony whatsoever to her during her life, as aforesaid. Provided always, and it is hereby expressly agreed and declared by and between the parties hereunto, and the true intent and meaning of these presents are, that the said H. H. shall be guaranteed, indemnified and secured by the said C. C. against any debt, contract or expense to be hereafter contracted by or on account of the said W.; and that in case the said H. H., or his personal representative, shall at any time hereafter be obliged to pay, and shall actually pay, any debt or debts which the said W. shall at any time hereafter, during her present coverture, contract or incur with any person or persons whatsoever;

MARRIED WOMAN'S PROPERTY AND OTHER RIGHTS 1817

that then, and in such case, it shall be lawful for the said H. H., or his personal representative, to deduct and retain of the annuity or yearly sum of ——— dollars, so hereby made and payable as aforesaid to the said W., all and every such sum and sums of money as he shall be obliged to pay, and shall actually pay, for or on account of any such debt as aforesaid, contracted or incurred by the said W., together with all costs, charges and damages which he may sustain on account thereof, and thus reimburse himself for such sum or sums of money, anything herein contained to the contrary notwithstanding.

Witness the following signatures and seals.

H. H. (SEAL.)

C. C. (SEAL.)

W. H. (SEAL.)

For certificate of acknowledgment, see *Acknowledgments*.

MARRIED WOMAN'S PROPERTY AND OTHER RIGHTS

See *Alimony; Curtesy; Divorce; Dower; Marriage; and Parent and Child*

- § 1. Married woman's emancipation
- § 2. Right of married woman to acquire and dispose of property
- § 3. Curtesy of husband
- § 4. Right of wife to make contracts
- § 5. She may sue and be sued
- § 6. Competency of husband and wife to testify
- § 7. Husband not responsible for wife's contracts, debts, or wrongs; her support
- § 8. How her estate passes at death
- § 9. Equitable separate estates not affected

§ 1. **Married woman's emancipation.**—A married woman has been at last almost entirely emancipated from her long-time common law legal slavery. The first act for her freedom was passed in 1877, which was enlarged with the Code of 1887, and still further enlarged by subsequent acts, and especially act 1900, and acts subsequent thereto, and the Code of 1919, until now, with her recently obtained right to vote and hold office (Acts 1920, p. 588; Va. Const., § 32); and to practice law (Code, § 3408, as amended by Acts 1920, p. 66), and the equalizing of the law of descents and distribu-

tions, etc., by Acts 1922 (see *Descents and Distributions*), she stands almost equal in law, as she is in other respects to her erstwhile "lord and master." No longer is she classed in the uncomplimentary company of infants, lunatics, and idiots, as exceptions in statutes involving legal capacity or power; but now, all through the Code, the phrase "or a married woman" is left out of such exceptions, and she keeps honored company in law as in love with her equal partner and companion.

She may, if 18, be a notary like a man (§ 2851); and may attend William and Mary College along with the boys (Acts 1918, p. 424).

§ 2. Right of married woman to acquire and dispose of property.—By section 5134 of the Code: "A married woman shall have the right to acquire, hold, use, control, and dispose of property, as if she were unmarried," or single, and her property is not subject to the debts or liabilities of the husband. This and section 5227 gives her the right to make a will like any other person, and the act of 1900 has omitted her in naming the exceptions as to who may make a will (Code, §§ 5227-8).

She may dispose of her contingent right of dower by uniting with her husband in a deed or contract, or by her sole act, if he has previously disposed of his interest (Code, § 5135); and a deed by them conveys any other interest she may have (Code, § 5211). A deed or will to husband and wife of real or personal property, gives each an undivided one-half interest (Code, § 5159).

A wife of an infant or insane husband may convey her own estate or release her dower in lands of such husband, where they are sold, and the same right in the proceeds of sale are secured to her or compensation made (Code, §§ 5344-5).

For how right of dower of insane wife, or curtesy of insane husband may be passed with same rights in purchase money secured to her or him, or compensation made, see Code, § 5346.

For control of estate of a married woman, who is a minor, through a receiver, see Code, § 5136. For when such estate may be sold, see Code, § 5137.

A wife's right of entry into land is not barred by the acts of the husband (Code, §§ 5441-2).

§ 3. Curtesy of husband.—The husband is entitled to curtesy (i. e., a life estate at her death) in his wife's real estate (but not in her equitable separate estate fixed on her by special settlement—see section 9, below), when the common law requisites therefor exist (see *Curtesy*); and she cannot deprive him thereof by her sole act; “but neither his rights to Curtesy nor his marital rights shall entitle him to the possession or use, or to the rents, issues, and profits of the said real estate during the coverture” or marriage (Code, § 5134). “Marital rights” (i. e., rights by marriage), as to real estate, is the right to control and to use the rents and profits thereof.

§ 4. Right of wife to make contracts.—Section 5134 of the Code says: “A married woman may contract and be contracted with” as if she were unmarried. By section 5215, she may, in conjunction with her husband, by a power of attorney duly executed, acknowledged, and certified, appoint an attorney in fact, to execute and acknowledge for record any deed or other writing which she might execute and acknowledge in conjunction with her husband.

The wife, like any other agent, may bind the husband, upon the score of agency, expressed or implied. The agency is implied, (1) from the usage of the parties, as where the husband has been accustomed to recognize the contracts and dealings of the wife in the particular in question, as binding upon him; (2) from the custom of the neighborhood, whereby particular transactions are usually managed by the mistress of the family; (3) from the husband's voluntarily and knowingly taking the benefit of the contract, as where he knowingly suffers his wife to wear or use articles of dress or jewelry purchased by her; and (4) from the peculiar circumstances of the husband's family, as where, by long absence or protracted illness, his personal attention to his domestic affairs is rendered impossible. (1 Minor, 372-8.)

§ 5. She may sue and be sued.—By section 5134 of the Code also, she may sue and be sued as if she were unmarried; and in an action for a personal injury, she recovers for herself the entire damage sustained, notwithstanding the husband's right to her services about her domestic affairs, and the husband cannot sue for such services. For the wife's inter-

est in damages recovered for wrongful death of the husband, see Code, § 5787, as amended by Acts 1920, p. 26; § 5788; and *Death by Wrongful Act, etc.*

§ 6. Competency of husband and wife to testify.—They may testify for or against each other in all cases, civil and criminal; except in criminal cases they may be compelled to testify in behalf of each other, but are not compelled nor allowed without the consent of the other to testify against the other, except where the offense was committed by one against the other; but if either testify as a witness for the other, he or she is competent, and (except as to communications between them) may be compelled to testify against the other. Failure, however, of either to testify shall raise no presumption against the accused nor be the subject of any comment before the court or jury by the prosecuting attorney. Where the offense is committed by one against the other, each is a competent witness except as to communications between them; as to these, it is provided that neither shall, without the consent of the other, be examined in any case, civil or criminal, as to any communication privately made by one to the other while married, nor shall either be permitted, without such consent to reveal in testimony after the marriage relation ceases any such communication made during marriage. (Code, §§ 6210-12.)

§ 7. Husband not responsible for wife's contracts, debts, or wrongs; her support.—On the other hand, the husband is not responsible for any contract, liability, or tort (slanders, assaults, frauds, and other injuries) of his wife, whether incurred or committed before or after marriage (Code, § 5134).

But the husband is still bound by his common law duty to supply his wife with the necessities suited to her station and his ability, or that station he knowingly allows her to assume; and if he fails, he is proceeded against therefor—see *Desertion and Non-Support*.

This duty of support is not terminated by the parties living separately, nor even by a divorce from bed and board, nor by a public or general notice not to trust, however it may be as to notice to particular persons; and it makes no difference that the wife owns abundant property, even though she be rich and he poor. But he is relieved from this obli-

gation, (1) where the wife refuses without sufficient reason (e. g., cruelty, etc.,) to live with him, and abandons his house and society; (2) where she is guilty of adultery; (3) where she is supplied by him, or indeed from any source, with necessities, or the means of procuring them, whether the existence of such supply be or be not known to the person who furnishes her the articles of support he is claiming pay for. (1 Minor, 373-5.)

If the wife, by her husband's cruelty or misconduct, is obliged to leave his house, she may compel him to allow her alimony, which, however, is not to relieve the husband from paying a person for necessities furnished her meanwhile, before she obtains alimony. See *Alimony*.

§ 8. How her estate passes at death.—If she dies without a will, her estate passes according to the general law as to "descents and distributions", subject to her debts and the curtesy of her husband (Code, §§ 5138, 5264, etc.). See *Descents and Distributions*.

§ 9. Equitable separate estates not affected.—The "married women's law" does not prevent the creation of equitable separate estates, which may be created as heretofore, and are to be held in all respects according to the provisions of the instrument creating them and with all the powers thereby conferred (Code, § 5139). An estate made hers by statute is her statutory separate estate; those made hers by the instrument alone, are her equitable separate estate.

An equitable separate estate is a right or interest in land or personality, or both, usually held in trust, which, unlike legal estates, courts of equity alone will recognize and enforce. They are further distinguished from her statutory estate by the terms of the instrument creating them.

By such a settlement on the wife all rights of the husband (as, curtesy and all marital rights) may be excluded. (Revisors' Note to Code, § 5139; see section 3, above; Code, § 5158; and 83 Va. 392.)

The marital rights (i. e., rights by marriage, of the husband as to real estate, which may be excluded, are, besides curtesy, the husband's common law right to the possession and use of the estate and to the rents, issues and profits; and as to personal property (and even an estate for years in

realty), the husband's absolute right, for the most part, at common law, to all the wife's personal property in possession in her own right (not her equitable estate) or tangible property to which she has title, though not in possession, and all choses in action (bonds, notes, or other right of action for debt or damages in connection with a contract, or for an injury to the wife's person or property), which he reduces to possession during the marriage. (1 Minor, 325-36.)

The equitable separate estate may arise out of a deed before marriage by the wife herself, or by the husband or some one else, either before or after marriage.

No particular phraseology is necessary to create such an estate—only such language as, in connection with the surrounding circumstances, show an intent to exclude the power and marital rights of the husband. The following, however, has been held not sufficient: A legacy to her "own use and benefit"; "to be under her sole control"; "to be paid into her own proper hands, to and for her own use and benefit", to a woman and her assigns, "for her and their absolute use and benefit." On the other hand the following has been held sufficient; where the gift is "to her sole and separate use"; "to her sole use, benefit, and disposition"; "for her own use and at her own disposal"; "for her own sole use"; "for her sole use and benefit"; "free from the power of her husband"; "for her own use and benefit independent of any other person"; "to enjoy and receive the issues and profits"; "for her support and maintenance"; "the profits to be paid to her separate use"; "to be used by the trustee for her", etc. Where, however, the conveyance is by the husband, it is construed to give a separate estate without such technical words. And where the conveyance is to an unmarried woman, not in contemplation of marriage, nor as a provision for that event, the language should be clearer and stronger, to create a separate estate in her, as against any possible future husband. (1 Minor, 345-8.)

§ 10. Form of deed for an "equitable separate estate."—

No. 1. MARRIAGE SETTLEMENT OF A WIFE'S FORTUNE TO HER USE, AS A SEPARATE AND DISTINCT ESTATE

(Matthews' Forms, p. 187; Tate's Forms, p. 308.)

An indenture, tripartite, made and entered into this ——— day of

—, in the year 192—, between A. B., of —, of the first part, C. D., of —, of the second part, and H. K. of —, of the third part. Whereas, the said C. D. is seized and possessed of certain lands, tenements and hereditaments, situate, lying and being in —; and whereas, a marriage is agreed upon, and intended to be shortly had and solemnized by and between the said A. B. and C. D.; and whereas it was agreed upon, by and between the said A. B. and C. D., that the said C. D. should, notwithstanding her intended marriage, have, hold, enjoy and possess all her said property above described, with all and every the rights, titles, interests and profits of, to, in and out of the same; free and separate from all the claims or demands of the said A. B., arising from the consummation of the above marriage. And whereas, the said C. D. hath relinquished, discharged and forever quit-claim to all and every part of the property, real and personal, of him, the said A. B., to which she, the said C. D., might, on the perfecting of the above marriage, be entitled to, by virtue of dower, or in any other way however. Now THIS INDENTURE WITNESSETH, that in consideration of the said intended marriage, and in pursuance and perfecting of the said hereinbefore mentioned agreements, and in consideration of the sum of — dollars, good and lawful money of the United States, to the said C. D. in hand paid by the said H. K., at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, she, the said C. D., with the consent and approbation of the said A. B., testified by his being a party to, and sealing and delivering these presents, hath bargained, sold, assigned, transferred and set over, and by these presents doth bargain, sell, assign, transfer and set over unto the said H. K., his executors, administrators and assigns, all (here describe the property), to have and to hold the said property hereby covered unto the said H. K., his executors, administrators and assigns. But nevertheless, upon on the trust, and for the intent and purpose hereinafter expressed and declared of and concerning the same. That he, the said H. K., his executors, administrators or assigns, shall hold and manage the said property, and all and every part and parcel thereof, to and for the sole and separate use, benefit and disposal of the said C. D., her said marriage notwithstanding. And that the same, in no manner whatsoever, shall be subject to the direction, control or disposition of him, the said A. B., her intended husband, or be liable for his debts. And upon this further trust, that he, the said H. K., his executors or administrators, shall and will pay, transfer or deliver unto the said C. D., or unto such person or persons, and at such time and times, and in such proportions, manner and form, as she, the said C. D. may direct, by her request or order, made in writing, attested by three or more creditable witnesses, all the rents, issues and profits of the said property, so conveyed as aforesaid. And that all the said separate and distinct estate, and the produce and increase thereof, shall be had, taken, held and enjoyed by such person and persons, and for such use and uses, as the said C. D. shall at any time or times hereafter, during her life, limit, devise, order or dispose of the same, or any part thereof, either by her last will and testament in writing, or by any other writing whatsoever, signed

with her hand, in the presence of three or more creditable witnesses. And the said A. B., for himself, his heirs, executors and administrators, covenants, agrees and promises, to and with the said H. K., his executors, administrators and assigns, by these presents, in manner following; that is to say, that if the intended marriage shall take effect, he, the said A. B., shall and will permit and suffer the said C. D. to give, grant and dispose of her said separate estate, as she shall think fit, in her lifetime, and to make such will or other writings as aforesaid, and thereby to give, order, devise, limit and appoint her said separate estate to any person or persons, for any use, intent or purpose whatsoever; and that he the said A. R., shall and will permit and suffer such will, hereafter to be made by the said C. D., to be duly proven by the executors in such will named or to be named and probate of such will to be had and taken as usual; and that the person or persons to whom the said C. D. shall give or dispose any part of her said separate estate, by her will, or any other writing that shall be signed, sealed and executed by her in the presence of three or more creditable witnesses as aforesaid, shall and lawfully may, peaceably and quietly have, hold, use, occupy, possess and enjoy the same according to the true meaning of such gift, devise or appointment, without any hindrance or interruption of or by the said A. B., his executors, administrators or assigns, or any of them; and that he, the said A. B., shall and will, from time to time, and at all times from and after the said intended marriage shall take effect, upon every reasonable request, and at the proper costs and charges of the said H. K., or his executors and administrators, make, do and execute all and every such further act and acts, thing and things, for the better settling, recovering and receiving the moneys, goods and estate of the said C. D., allotted and declared for her separate use, benefit and disposal as aforesaid, as by the said H. K., or his executors and administrators, or by their, or any of their learned counsel in the law, shall be reasonably devised, advised or required. In witness whereof, the said parties have hereto set their hands, and affixed their seals, on the day and year first herein written as the date hereof.

A. B. [L. s.]

C. D. [L. s.]

H. K. [L. s.]

MARSHALLING ASSETS OR SECURITIES

This is a species of subrogation or substitution. Where one party has a lien upon or interest in, two funds, for a debt, and another party has a lien upon or interest in, one only of the funds for another debt; equity will compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary to pay the claims of

both parties, and will not operate to his prejudice; or to the prejudice of third parties as sureties. (See Bouvier's Law Dictionary.)

MILITIA AND MILITARY FUND

The statutes concerning are continued in force (Code, § 2673). For an act as to the Virginia Council of Defense, etc., see Acts 1918, p. 434; as to staff officers in the National Guard, Acts 1918, p. 460; as to organization of home companies, Acts 1918, p. 495.

MILLS

See Code, §§ 3582-95, and Acts 1920, p. 574, amending § 3594.

MINORS, INFANTS, OR CHILDREN

See *Abduction; Apprenticeship; Desertion and Non-Support; Guardian and Ward; Juvenile and Domestic Relations Court; Parent and Child.*

- § 1. Scope of subject
- § 2. Who is a minor or an infant
- § 3. Things he may do at different ages
- § 4. Suits by a minor
- § 5. Suits against a minor
- § 6. Minor's responsibility for crime
- § 7. Minor's power to dispose of his property
- § 8. Minor's power to make contracts
- § 9. Minor's liability for wrongs
- § 10. Recognizance for a minor
- § 11. Deposits in bank by minor
- § 12. Minor may have name changed

- § 13. Corporal punishment of minor, when
- § 14. To whom a minor's property is taxed
- § 15. When a minor may be a notary
- § 16. Certain offenses as to minors
- § 17. Damages in case of death of parent by wrongful act
- § 18. When money paid to minor without a guardian
- § 19. When children not to be employed under certain ages
- § 20. Children left out of a will—see *Will*
- § 21. Homestead exemption for children—see *Homestead and other Exemptions*
- § 22. Rights of children in "poor law exemption," upon death of father
- § 23. How infant of convict mother disposed of
- § 24. Who are legitimate children
- § 25. Child unborn may inherit like others
- § 26. How property descends from minor
- § 27. Effect of indorsement or assignment of negotiable instrument by minor
- § 28. Liability of minor doing business as a trader
- § 29. Leasing or selling a minor's land
- § 30. Delinquent, dependent, or destitute or feeble-minded children
- § 31. Insane, epileptic, feeble-minded, or inebriate children
- § 32. Maternity or lying-in hospitals
- § 33. Children placed in family homes
- § 34. Misdemeanor to sell, injure, overwork, beat, etc.
- § 35. County or city may help poor children at home
- § 36. Adoption of minors—see *Adoption*
- § 37. Other child-welfare laws
 - (1) Protecting institutions
 - (2) Licensing, regulation, and inspection of children's boarding houses and nurseries
 - (3) Providing "Occupational Therapy" (or remedies) for children in certain institutions
 - (4) Desertion and non-support—see *Desertion and Non-Support*
 - (5) Juvenal and domestic relations courts—see *Juvenile Domestic Relations Courts*
 - (6) State and other boards or public welfare
- § 38. Forms under "Minors, Infants, or Children"

§ 1. **Scope of subject.**—Here we treat of the capacities and disabilities of minors, and the various child-welfare laws. For support, custody, correction, wages, services, and consent to marriage, see *Parent and Child*. For his guardianship, custody, maintenance, management of his estate and the care of his education, see *Guardian and Ward*. For the various statutes for the protection of minor employees, see *Employer and Employee*, section 7.

§ 2. Who is a minor or an infant.—In law a minor or an infant (they mean the same) is one under 21 years of age. He attains his majority on the first moment of his twenty-first anniversary. (1 Minor, 502.)

§ 3. Things he may do at different ages.—He may be capable of crime at 7; presumed capable at 14; make oath of allegiance at 12; assent to marriage, male 14, female 12 (Code, § 5090); consent to sexual intercourse, 15 (Code, § 4414, as amended by Acts 1918, p. 139); make will of chattels, 18 (Code, § 5228); choose a guardian, 14 (Code, § 5317); be a notary public at 18 and sue for his fees (Code, §§ 2501-2); take the bar examination, but not to practice law, at 19 (Code, § 3419).

§ 4. Suits by a minor.—He sues in his own name by his next friend or *prochien ami*, as he is called (Code, § 5331). The next friend is answerable for the cost, in the first place, but he may reimburse himself out of the minor's estate; if a recovery is had, the amount is turned over to his guardian. He has the same right as an adult to sue for any injury to person or property; besides, a minor cannot be held responsible for contributory negligence, nor is the negligence of his parent or guardian imputable to him; and he is held only to such capacity and discretion to observe and avoid dangers as he actually has. If, however, he is a trespasser, and is injured in consequence thereof, he cannot recover, unless the injury was partly the fault of the defendant, or the thing causing the injury is such as naturally to attract children, as, in the case of railroad turn-tables, left unfastened and open to public access. (1 Minor, 503-5.)

He may sue for an injury to his person or property caused by another's intoxication (Code, §§ 4675-6).

A minor may file a bill of review within one year after his majority (Code, § 6316).

For what further time is allowed a minor to bring suits generally, see *Limitations to Remedies*.

§ 5. Suits against a minor.—He is sued in his own name like an adult, but can defend only by guardian *ad litem*—a guardian for the litigation—appointed by the court or judge in vacation, or the clerk, whether the minor has been served with process or not. Such guardian must be "a discreet

and competent attorney at law," or if he will not serve, "some other discreet and proper person" (Code, § 6098). No proceedings can legally be had against a minor until the guardian *ad litem* is appointed (1 Minor, 460-1); and where there is no such guardian, any judgment or decree against him may be reversed and amended by the same court which pronounced it.—at common law upon a writ of error coram nobis, and by statute on motion simply, after reasonable notice (Code, § 6329); and it is provided that no judgment or decree, if not to his prejudice, shall be arrested or reversed for the minor's appearance by attorney (§ 6331).

Where the guardian *ad litem* has rendered substantial service, the court may allow him a reasonable compensation and actual expenses, to be paid out of the defendant's estate; but the guardian is never liable to costs (Code, § 6098).

A guardian *ad litem* may also be appointed for purpose of serving notice, in a proceeding for the appointment of a substitute trustee (Code, § 6299).

No deposition must be taken in the presence of the guardian *ad litem* or upon interrogatories agreed on by him (Code, § 5339).

Courts of chancery are ever alert for the protection of minors; and he is given by statute six months after attaining his majority to show cause against a decree or order (§ 6305), which the chancery practice requires to be inserted in such decree or order. The only exception is where lands are sold for partition of the proceeds (§ 5282), where the minor is allowed no day to show cause (10 Grat. 594). The cause to be shown must, of course, be such as exists at the time of the decree (21 Grat. 636). Six months is also allowed a minor to show cause against a judgment in an ejectment case (Code, § 5487).

For further time allowed to bring suits against one because of being under age, see *Limitation to Remedies*.

§ 6. Minor's responsibility for crime.—Under 7, he is wholly incapable of crime; between 7 and 14, he may be proven capable; over 14, he is presumed capable as an adult. (1 Minor, 508).

§ 7. Minor's power to dispose of his property.—In general, he cannot convey or contract to convey, or do any

other act which is binding, relative to his property, all such transactions being voidable by him on coming of age; but subject to the following exceptions: He may make a valid will of personal estate at 18 or over (§ 5228); may at any age assign dower to his ancestor's widow, or make partition with some other joint owner, or may agree to do it, because he is compellable by suit to do both; may, under the direction of the court of chancery, execute trusts, or rather may have them executed (see §§ 5334, 6296, as amended by Acts 1918, p. 444); may execute a power of appointment simply collateral,—i. e., where he himself has no interest; and may act as an agent or attorney in fact for another person. (1 Minor, 508-9.)

By Acts 1922, p. — : "The disability of infancy shall be, and the same is hereby declared to be removed by marriage for the purpose of, and to the extent, only, that hereafter an infant wife, whether married before or after this act takes effect, may, in the manner prescribed by section 5135, pass her contingent right of dower in her husband's real estate as effectually as if she were an adult; and an infant husband, whether married before or after this act takes effect, may in like manner, pass his contingent right of curtesy in his wife's real estate, as effectually as if he were an adult."

§ 8. Minor's power to make contracts.—Such contracts are valid as are in general beneficial for him to be bound thereby, viz: (1) Contracts for necessities—see *Parent and Child*, section 2; (2) contracts for marriage settlement; (3) contracts of apprenticeship—see *Apprenticeship*; (4) contracts to do what the law would oblige him to do at all events, as, assignment of dower by infant heirs, and partitions between co-partners or other co-tenants who are compellable to make partition—all which are binding upon minors, if fair and reasonable—and contracts to perform military service. (1 Minor, 510-16.)

Such contracts are absolutely void as are in general prejudicial for him to be bound thereby, which is determined by the nature of the contract in general, and not by the particular contract as whether beneficial or not; but the courts have shown a tendency to hold contracts voidable as being more to the minor's interest, rather than void, and so now none are absolutely void except powers of attorney and agencies of all sorts. (1 Minor, 616-18.)

Where nothing can with certainty be said of a class of contracts whether it would be advantageous or hurtful to him to be bound thereby, they are voidable at his election, as, a personal privilege. This class embraces the great bulk of transactions in which any one can engage,—in fact all contracts which are not valid, nor void, as above enumerated. (1 Minor, 518-20.)

As to confirmation of contracts, a void contract cannot be confirmed, but only voidable contracts, as to which the minor, either during his minority or within a reasonable time after he becomes of age, may avoid the contract if he will; or when he reaches his majority, if he so elects, he may confirm it. This right of confirmation or avoidance prevails also against any one claiming under the party, although it be as an innocent purchaser for value. Nor is the right to avoid the contract affected by the fact that the minor is engaged in business or is accustomed to make contracts; nor even that he fraudulently represented himself to be of age, but in this case, while the defrauded person cannot recover on the contract, he may maintain an action for the fraud, to which infancy is no defense. His voidable contracts are, however, valid and binding until he repudiates it. (1 Minor, 520.)

Though at common law a contract might be confirmed by parol (or orally), now by section 5561 of the Code it is provided that no action shall be brought "to charge any person upon a promise made, after full age, to pay a debt contracted during infancy, or upon a ratification after full age, of a promise or simple contract made during infancy," unless the same, or some memorandum or note thereof be in writing and signed by him, or his agent, and the consideration need not be stated, but may be proved by other evidence.

No particular form of words are necessary for confirmation; it is enough if they show a clear recognition and confirmation of the previous contract, and they need not amount to a direct promise to pay. These have been held sufficient: "I have not the money now, but when I return I will settle with you;" "I will pay it (the note) as soon as I can make it, but not this year;" "I will endeavor to procure the money, and send it to you;" "I am sorry to give you so much trouble in calling, but I am not prepared for you, but will with-

out neglect remit you in a short time." These have been held not sufficient: "I owe the debt, and you will get your pay, but I will not give a note;" "I owe you, but I am unable to pay, but will endeavor to get my brother bound with me;" "I consider your claim worthy of my attention, but not of my first attention, but I will soon give it the attention due it."

Contracts of a personal kind, or relating to personal property, may be immediately avoided without waiting for the minor to attain his age and that finally and conclusively; because otherwise irreparable injury might ensue. And the avoidance may be by an act clearly demonstrating a renunciation of the contract, as, in case of a contract to serve, leaving the service and going elsewhere, or pleading infancy to a contract.

In case of executory contracts (contracts not yet performed), upon avoidance the minor must return any consideration still in his possession or control. Where the contract is executed in whole or in part, on the part of the minor, he may rescind the agreement and recover the money or property advanced, or a proper compensation for the work done by way of consideration, but in general not without restoring to the other party the equivalent received; but where the property has been lost, sold, or destroyed, during the minor's minority, there is no obligation to return. Mr. Minor says as to section 5561 of the Code, above, that it does not apply to a contract not under seal to do a collateral thing, or to executed contracts, and that these may be ratified as at common law. (1 Minor, 524-6.)

Minors not under 14 may make insurance contracts upon his life—see Acts 1922, p. —.

§ 9. Minor's liability for wrongs.—Minors are liable for torts, or civil wrongs, that is, injuries not arising out of a breach of contract, as, trespass, assault, slander, fraud, or wrongful conversion or embezzlement; and he is liable though he acted by the command of another or through an agent. As to whether the act is a tort or arises out of a contract, depends upon the prevailing or dominant character of the injury, or, in other words, whether the liability can be made out without taking any notice of the contract; if the prevailing charac-

ter be contract the minor may plead infancy, regardless of the form of the action; otherwise, he cannot. (1 Minor, 527-8.)

§ 10. Recognizance for a minor.—It is taken of another person, without further surety, if he be deemed sufficient. (Code, § 4975.)

§ 11. Deposits in bank by minor.—A deposit in bank by or in the name of a minor is held for his exclusive right and benefit free from the control of any one else, except creditors, and is to be paid to him; and his check, order, or receipt is a sufficient release and discharge for the bank. (Code, § 412.)

Where the money is in bank in a deceased person's name but belonging to a minor, or in the name of a minor, it may (in the first case after two weeks from the party's death), be paid to his guardian, upon presentation to the bank of a proper letter or certificate of his qualification. (Code, § 4125, as amended by Acts 1920, p. 21.) The bank may pay a deceased's check within two weeks after his death (§ 5748); so it cannot pay a guardian until after that time.

§ 12. Minor may have name changed.—By proper proceedings in court—see Code, § 5983, and note thereto.

§ 13. Corporal punishment of minor; when.—A minor under 16, convicted of a misdemeanor, may be permitted by the justice or judge, (in lieu of the punishment), to be whipped by his parent or guardian or some one selected by the justice or judge. (Code, § 1924). For correction of minor by parent, see *Parent and Child*, section 4.

§ 14. To whom a minor's property is taxed.—A minor's property is listed by and taxed to his guardian or trustee; if none, to his father; if none, to his mother; if none, to the person in possession (Code, § 2307, as amended by Acts 1920, p. 563).

§ 15. When a minor may be a notary.—He may when 18 years or more; and he may sue for fees (Code, §§ 2851-2).

§ 16. Certain offenses as to minors.—It is unlawful for any one, except a parent or guardian, to give any ardent spirits to a minor, except on the prescription of a physician, or to send a minor to obtain the same (Code, § 4639), and it is unlawful for him to have it in possession, whether his or another's (§ 4641). It is also unlawful to sell, barter, give,

or furnish a minor under 18, a pistol, dirk, or bowie knife, having good cause to believe him or her to be such minor, or to sell, barter, give, or furnish or cause the same to be done, to a minor under 16, cigarettes or tobacco in any form, having good cause to believe him or her to be such minor, fineable \$2.50 to \$100 (Code, § 4695, as amended by Acts 1922); or to sell or furnish to a minor under twelve, any toy gun, pistol, rifle, or other toy firearm, which by means of powder or other explosive discharge blank or ball charges, fineable \$50 to \$100, or jail 30 to 90 days, or both (Code, § 4697); or to give credit to any minor student of any college or university, without the written consent of his parent or guardian, or of an authorized officer of the school, fineable not under \$50 (Code, § 4707); or to permit a minor (or for him to do so) to play or loiter in a pool-room or billiard-room, outside a city or town, fineable not under \$5 and not over 6 months or both (Acts 1918, p. 536). It is death or penitentiary 5 to 20 years to have carnal knowledge (i. e., sexual intercourse) of a female of 15 years or more, against her will, by force, or of a female under that age; but if the child be over 14 and consents, the punishment is only penitentiary from 5 to 20 years; and if she be between 14 and 15, and consents, the subsequent marriage of the parties will bar a prosecution for the offense. This does not refer to lunatics in a hospital or inmates in a deaf, dumb, or blind institution, as to whom the penalty is death or penitentiary 5 to 20 years. (Code, § 4414, as amended by Acts 1918, p. 139.)

Illegal seizure or taking a child from its lawful custodian is punishable by penitentiary 2 to 5 years, or jail not over one year and fine not over \$1,000 (Code, § 4409); and taking a female under 16 from her lawful custody, for the purpose of concubinage (i. e., habitual and continued illegal cohabitation with one person) or prostitution (i. e., such intercourse with many persons), is punishable by penitentiary 3 to 10 years, and aiders, from 2 to 5 years (Code, § 4411).

Persons over 18, causing or encouraging children under 18 to commit a misdemeanor, or sending him to or causing him to enter a place for an unlawful purpose, or subjecting him in any way to vicious or immoral influences, or causing or encouraging his dependency, neglect, or delinquency, is fine-

able not over \$500, or jailed not over one year, or both (Code, § 1923, as amended by Acts, 1920, p. 269).

Knowledge that he is under 18 is necessary to the offense (101 S. E. (Va.) 872).

§ 17. Damages in case of death of parent by wrongful act.—The jury decides in what proportion they shall be distributed to the surviving widow or husband and children and grandchildren of the deceased, and the amounts are paid accordingly (Code, § 5787, as amended by Acts 1920, p. 26, § 5788). See *Death by Wrongful Act, etc.*

§ 18. When money paid to minor without a guardian.—Where a court has control of a fund under \$500, belonging to a minor, or supervision of its administration, whether a suit be pending therefor or not, it may, without intervention of a guardian, if it is made to appear to the court that he is of sufficient age and discretion to use the fund judiciously, cause the fund to be paid directly to the minor; but if the minor is too young or otherwise incapable or incompetent to handle it, he may order the same to be paid to one of his parents for the education, maintenance and support of the minor; or if there is no living parent capable of handling the fund, the court may by other means cause the fund to be applied to the minor's "maintenance and support" ("education" is omitted). (Code, § 5343.)

And by another act (Acts 1920, p. 361), whenever there is accruing to any person, adult, or minor, any sum of money from any source, not over \$300, it may be paid into court, and by the court, by an order entered of record, paid to such person, if considered competent to expend and use the same, without the intervention of administrator, guardian, or committee, the clerk taking a receipt, signed and acknowledged, which is entered of record in the book of fiduciary accounts. (Acts 1920, p. 361.)

§ 19. When children not to be employed under certain ages.—Under 14, not in any gainful occupation, other than on farms or in gardens, except as specified below.

Under 16, (1) not more than 6 days a week; (2) nor more than 44 hours a week; (3) nor more than 8 hours a day; (4) nor before 7 a. m. nor after 6 p. m., except on farms, in orchards, or in gardens; and the employer must keep posted in the place the maximum number of hours such children are re-

quired to work, the hours of beginning and ending of each work day, and the hours when time allowed for meals begins and ends, and keep on file subject to inspection the child's employment certificate and other records, as required, the certificate to be issued by the chief school attendance officer, or if none, by the division superintendent of schools, or someone designated by him (and he is required to designate someone where there is no attendance officer in the city, town or county), and only upon application of the child in person, accompanied by the parent, guardian or custodian of such child. The certificate or permit is issued only when he has filed the statement from the employer as to employment, proof of age, and certificate of physical fitness.

Under 16, not in any mine, quarry, tunnel, excavation work, brick or lumber yard, nor operate or assist in operating any dangerous machinery; nor oil, assist in oiling, wiping or cleaning any machinery; nor in any capacity in preparing any composition in which dangerous or poisonous chemicals are used, or in the manufacturing of paints, colors, or white lead. No boy under 16, nor girl under 18, in any retail cigar or tobacco store, or theatre, concert hall, pool hall, bowling alley, or place of amusement or hotel, restaurant, steam laundry, or passenger or freight elevator.

No male under 14 nor female under 18, as a messenger to deliver messages or goods.

No male under 18, nor girl under 21, to act as such messenger before 5 a. m. or after 10 p. m.

No boy under 14, nor girl under 18, in street or public place peddling, boot-blackening, or distributing or selling, newspapers, magazines, periodicals, or circulars, or any gainful occupation in a street or public place, except a boy between 12 and 16 may follow (not over 8 hours a day) boot-blackening or distributing and selling newspapers, etc., running errands or delivering parcels between 6 a. m. and 7 p. m. when school is not in session, but he must procure and carry on his person a badge (bearing a number, name, age, and address), issued to him as an employment certificate is obtained (see above), for which he deposits 50 cents.

An employer or manager, or one having control of the child, violating any of the above provisions is guilty of a misdemeanor, punishable by a fine of \$10 to \$25 for the first

offense; \$25 to \$50 for the second; \$50 to \$250 for any subsequent offense, or in addition jail 30 to 90 days.

The Commissioner of Labor must see to the enforcement of this act. (Acts 1922, p. —, amending former Acts.)

§ 20. Children left out of a will.—See *Will*.

§ 21. Homestead exemption for children.—See *Homestead and other exemptions*.

§ 22. Rights of children in "poor law exemption," upon death of father.—Where a householder dies leaving a widow, minor children, or daughters who have never married, the "poor debtor's" property of section 6552 of the Code vests in such of them as are then members of the household, absolutely, free from funeral expenses, debts of father, or charges of administration (Code, § 6562).

§ 23. How infant of convict mother disposed of.—An infant accompanying a convict mother to the penitentiary or born therein, is returned, after 4 years of age, to the mother's county or city, whose court will direct its disposition (Code, § 5009).

§ 24. Who are legitimate children.—See section 1, under *Parent and Child*.

§ 25. Child unborn may inherit like others.—Such a child born in 10 months after the death of the father inherits property like other children (Code, § 5271).

§ 26. How property descends from minor.—If a minor die without children, having real property derived by gift, will or descent (not by purchase) from one of his or her parents (not from some one else), it goes entirely to that parent, if living; if not, then to his or her kindred on the side of the other parent (Code, § 5272). But it should be noted that a minor 18 or more, may by will dispose of his personal property (§ 5228); if he does not, or if he is under that age, such property, upon his death, is distributed as if he were an adult (Code, § 5273).

§ 27. Effect if indorsement or assignment of negotiable instrument by a minor.—It passes the right thereto, but he incurs no liability thereby (Code, § 5584).

§ 28. Liability of minor doing business as a trader.—If a minor transacting business as a merchant or other "trader," fails to post conspicuously by sign in bold letters on the place of business, and also to publish a two-weeks'

notice in the local newspaper, if any, the fact that he is a minor, all property, stock, bonds, notes, accounts, etc., acquired or used in such business, is liable to his creditors for his debts, and no plea of infancy is allowed. (Code, § 6108.)

§ 29. Leasing or selling a minor's land.—By ample statutory provisions in Virginia, a minor, by proper court procedure, at the suit of his guardian, may sell or convey his estate (real or personal), or lease, exchange, or encumber his real estate, where the court thinks the sale, etc., is for the minor's benefit, and that the right of other parties will not be violated, the sale not being prohibited by the will or other instrument creating the estate. (Code, §§ 5334-47, and Acts 1922, amending § 5335.)

§ 30. Delinquent, dependent, or neglected children.—

(1) *Jurisdiction.*—The juvenile and domestic relations courts (see *Juvenile and Domestic Relations Courts*), or where none established, the circuit and corporation courts have exclusive original jurisdiction of all cases as to such children, and to declare such children wards of the State, and direct their custody, discipline, supervision, care, protection, and guardianship, having regard to the child's best interest; and the court may decide as between parents whether the father or mother shall have the custody, education, direction, and control of such child. The trials are to be private (excepting officers, attorneys, witnesses, the accused or his relatives or guardian or custodian), and the records are to be withheld from indiscriminate public inspection. The case is not to be regarded as a criminal case. (Code, § 1905, as amended by Acts 1922.)

(2) *Definition of "delinquent," "dependent," and "neglected."*—For the purpose of this chapter the words "delinquent child" shall include a child under eighteen years of age who:

Violates a law of this State or a city, town or county ordinance; or

Is incorrigible; or

Is a persistent truant from school; or

Habitually associates with vagrants, criminals or reputed criminals, or vicious or immoral persons; or is an habitual loafer or vagrant; or

Uses habitually intoxicating liquor as a beverage, or who uses opium, cocaine, morphine, or other similar drug without the direction of a competent physician; or

Frequents a disorderly house, or house of ill-fame; or

Patronizes a gambling house or place where a gambling device is operated; or

Habitually and without restraint uses or writes, or circulates vile, obscene, vulgar, profane or indecent language, or is guilty of acts of moral perversion.

The words "dependent child" shall mean a child under eighteen years of age, who is homeless or destitute or dependent on the public for support; or whose parents, for good cause, desire to be relieved of its care and custody or who is without a parent or guardian able to provide adequately for its support, training and education and is unable to maintain himself by lawful employment, except such children as are herein defined as "neglected" or "delinquent."

The words "neglected child" shall mean a child under eighteen years of age:

Who is abandoned by both parents, or if one parent is dead, by the survivor, or by his guardian; or

Who has no proper parental care or guardianship; or

Who habitually begs or receives alms; or

Who is found living in a house of ill-fame or with vicious or disreputable persons; or

Whose home, by reason of improvidence, neglect, cruelty or depravity on the part of its parent, guardian or other person in whose care it may be, is an unfit place for such child; or

Whose parents or guardian neglect or refuse, when able to do so, to provide medical, surgical or other remedial care necessary for its health or well-being; or

Whose parents or guardian neglect or refuse to apply for the admission of such child to a proper institution or hospital when said child is so defective, mentally or physically, as to require such custodial care, or treatment; or

Whose parents or guardian permit such child under the age of 16 years to engage in any occupation or calling defined by the Child Labor Law as dangerous to the life or limb or injurious to the health or morals of such child.

All delinquent, dependent or neglected children, as defined in this chapter, shall be considered, for the purposes of this chapter, wards of the State and in need of its care and protection, and proceedings under this chapter shall be for the purpose of determining whether or not the State should assume the guardianship, supervision, custody or control of the child in question." (Code, 1906, as amended by Acts 1922.)

(3) *Style and commencement of proceedings.*—"The style or title of the proceedings under the provisions of this chapter, when against a child shall be "Commonwealth of Virginia *in re* _____" (inserting the name of child). Any reputable person having knowledge or information that a child, who resides in or who is actually within a city or county of this State, is within the provisions of this chapter, or subject to the jurisdiction of a court hereunder, may, and any probation officer having such knowledge or information, shall file with said court a verified petition, which petition shall set forth the name, residence and age of the child, and name and residence of the parents, if known to the petitioner, and the name and residence of the person or persons having the guardianship, custody, control and supervision of such child, if the same be known, or can be ascertained by petitioner, or the petition shall state that they are unknown if that be the fact. The petitioner shall state the facts which bring said child within the provisions of this chapter, and it shall be sufficient for that purpose to aver that the child mentioned therein is "dependent," "neglected," or "delinquent," as the case may be, and in need of the care and protection of the State in that (here stating concisely the facts which bring said child within said terms as herein defined), and said petition shall be sworn to by petitioner; but such affidavit may be made upon the information and belief of affiant." (Code, § 1907, as amended by Acts 1922.)

(4) *Issuance of summons.*—"Upon the filing of the petition, the clerk or judge shall forthwith, or after causing an investigation to be made by a probation officer or other person designated by said court or judge, cause a summons to be issued, signed by the judge or clerk of said court, and requiring the child to appear before the court, and requiring

the parents, guardian, or the person having the custody, control or supervision of the child, or the person with whom the child may be found, to appear with the child, at such time and place as may be stated in the summons, to show cause why the child should not be dealt with according to the provisions of this chapter. If it appears from the petition that the child has violated any penal law of this State (or any ordinance of a city, town, or county) for which it might be prosecuted, or that the child is in such condition that its welfare requires that its custody be immediately assumed, the judge or clerk may endorse upon the summons a direction that the officer serving the same shall at once take said child into his or her custody. When any child is taken into custody under such summons, such child may, if in the judgment of the judge of said court it is not inconsistent with his or her welfare, be admitted to bail, or released on his or her own recognizance, or released into the custody of his or her parent, or of a probation officer or other person designated by the judge of said court. When not so released said child shall be detained pending the hearing of the case and final disposition of said child in accordance with the subsequent provisions of this chapter." (Code, § 1908, as amended by Acts 1922.)

(5) *Service of summons*.—"Service of such summons within said county or city shall be made by delivering to and leaving with the person summoned a true copy thereof. If the child mentioned in the petition be present in court, no summons to said child shall be necessary to give the court jurisdiction of such child. When the person named in the summons, other than the child, is present in court, or is a non-resident of the State, or cannot be found after reasonably diligent search or when said child is in court by reason of the violation of any penal law of the State or any ordinance of said county, town, or city, service of a summons upon such other person named in the summons shall not be necessary to give the court jurisdiction; but if such other person be not present in court, and if for any of the reasons set out above has not been served with a summons, the court must appoint probation officer, or a discreet and competent attorney at law to act as guardian *ad litem* to represent the

interest of such child and such guardian *ad litem* shall be present at the hearing of said case to represent said child. But in no case shall the trial proceed until the parents or parent of such child, if residing within the State, have been duly notified of the pendency of such proceedings, unless the judge shall certify on his record that diligent efforts have been made to locate and notify such parents, without avail. In cases where a summons is necessary it shall be sufficient to confer jurisdiction if service is effected at any time before the time fixed in the summons for the return thereof, but the court shall not proceed with the hearing earlier than the third day after the date of service, if objection be made by the parties served, or by a guardian *ad litem* appointed to represent the interest of such child. Proof of service may be made by the affidavit of the person who delivers a copy of said summons to the person summoned, if the summons be not served by an officer, but if served by a State, county or municipal officer his return shall be sufficient without oath. The summons shall be considered a mandate of the court, and wilful failure to obey its requirement shall subject any person guilty thereof to liability for punishment as for a contempt." (Code, § 1909, as amended by Acts 1922.)

(5) *Return of summons; trial of case; disposition of child.*—"Upon the return of the summons, or at the time set for the hearing, as hereinafter provided, the court shall proceed to hear and determine the case. The judge of said court, subject to the rights of counsel, may conduct the examination of witnesses, and may take testimony and inquire into the habits, surroundings, conditions, tendencies and guardianship of said child so as to enable the court to determine if such child is delinquent, dependent or neglected, and if so, what order or judgment will best conserve the welfare of said child and carry out the objects of this chapter. If said child is found by the court to be dependent, delinquent or neglected, the court shall so adjudicate, and thereafter, unless said finding and judgment is annulled or appealed as herein provided for, said child shall during his or her minority, or so much thereof as the court shall consider to be for the best interest of said child, for the purposes of this chapter, be considered a ward of the State and be subject to the guardianship of the court as herein provided for.

"After such hearing and adjudication the court may place the child under the care and control of a probation officer, and may allow such child to remain in its home, subject to the visitation of a probation officer, to be returned to the court by the parent or probation officer when ordered to do so by the judge for further proceedings whenever such action may appear to said court or judge necessary; or the court may order the child to be placed in a suitable family home, willing to receive it, subject to the friendly visitation and supervision of a probation officer or of an agent of the State Board of Public Welfare, and subject to the further order of the court; or it may authorize the child to be boarded out in some suitable family home, school or institution (approved by the State Board of Public Welfare); or the court may commit such child to the State Board of Public Welfare or to any society, association or institution incorporated under the laws of Virginia approved by said State Board of Public Welfare, or the court may make such other order or judgment as the court may deem to be for the best interests of the child and for the proper protection of the public interests; provided, that all delinquent children intended to be placed in a State institution shall be committed to the State Board of Public Welfare—it being the purpose of this chapter to make said board the sole agency for the guardianship of delinquent children committed to the State. But children placed by said board in a State institution shall not be removed therefrom without the consent and approval of the governing board of such institutions or its superintendent. All commitments under this chapter shall be for an indeterminate period having regard to the welfare of the child and the interests of the parents, but no child shall be committed hereunder shall be held or detained after such child shall have attained the age of 21 years; and the said State Board of Public Welfare and said societies, associations or institutions may place under contract children committed under this chapter in suitable family homes, institutions or industrial schools for the care of children without further process of law for a term of years not exceeding the period of minority of such child, and whenever such a child shall be so placed by such society, association or institution a

report of such action shall be made to the State Board of Public Welfare in such form as may be required by it. Any order made by the court or any commitment to any such private society, association or institution shall be subject to modification or revocation from time to time, as the court may deem to be for the welfare of such child; the duty being constant upon the court to give all children subject to its jurisdiction such oversight and control as may conduce to the welfare of the child and the best interests of the State. In committing any child to any custodial agency, or placing it in any guardianship other than that of its natural guardian, the court shall, as far as practicable, select some individual holding to the same religious belief as the parent of such child; or some institution or association governed by persons of the same religious faith as that of the parents of the child, unless the commitment be to a State institution or agency.

"Unless the offense is aggravated or the child is of an extremely vicious or unruly disposition, no court, judge or justice shall sentence or commit a child under the age of 18 years to a jail, workhouse, or police station, or send such a child on to the grand jury, nor sentence such child to the penitentiary or to the State Convict Road Force." (Code, § 1910, as amended by Acts 1922.)

For when the commitment may be to a county or city farm, the chain gang, or, the Prison Association of Virginia, see *Justice of the Peace*, div. VI, section 11; and *Chain Gang*.

(6) *Arresting children; transfer of cases from justices and courts not having jurisdiction of their trial.*—"Nothing in this chapter shall be construed as forbidding the arrest, of any child as is now or may hereafter be provided by law. But no warrant of arrest shall be issued for any child under 12 years of age, except with the written permission of a judge of a court of record, or the justice of the juvenile and domestic relations court, nor shall any such child be transported, conveyed, or ridden in a police patrol wagon, or other vehicle usually used for the transportation or conveyance of adult prisoners. And no warrant of arrest shall be issued for any child between the ages of 12 and 18 years, except when the use of such process is imperative. Whenever

any child under eighteen years of age, and who otherwise comes under the provisions of this chapter, is brought before any other justice or court in such county or city, such justice or court shall forthwith, by proper order, transfer the case to the said juvenile and domestic relations court of said circuit, corporation or hustings court; and shall order and direct that said child be taken to the place provided in such county or city for the detention of children coming within the provisions of this chapter. Said justice or court may, however, admit such child so transferred to bail, or release such child into the custody of some suitable person, to appear before said juvenile and domestic relations court or circuit, corporation or hustings court at a time designated in said undertaking of bail or in said order of transfer. All warrants and other processes or papers in the hands of such justice or court relating to the case so transferred shall be by him or by the clerk of said court forthwith transmitted to the clerk of said juvenile and domestic relations or circuit, corporation or hustings court and shall become a part of its records. Said juvenile and domestic relations, or circuit, corporation or hustings court shall thereupon have jurisdiction of said cause, and shall proceed to hear and determine the same in like manner as if the proceedings had been instituted in said court by petition as herein provided for." (Code, § 1911, as amended by Acts 1922.)

(7) *Regulations as to the custody of dependent, delinquent or neglected children.*—"Whenever any child is found to be dependent, neglected or delinquent within the meaning of this chapter, and the court, in its discretion, shall take the custody of said child from its parents, or either of them, or from the custody of any person or persons liable for its support and shall place it in the custody of the other parent, or in the custody of any other person, or in the place of detention or parental school provided by such county or city, or in any hospital or other institution or with any custodial agency, public or private, the court may, after service of an order to show cause or the issuance and execution of a warrant upon the person from whose custody the child has been taken, proceed to inquire whether or not said child should be supported by said person, and may order and adjudge that the expenses

of caring for said child, or part thereof, shall be paid by such person or persons, and may direct when, how and where money for said expenses shall be paid; and in the event that said person so adjudged liable to pay such expenses or support shall willfully, and without just excuse, fail or refuse to pay same in accordance with the court's said order, said person so failing to pay same shall be guilty of a misdemeanor and be dealt with in accordance with the provisions of the statute relating to desertion and non-support. An appeal may be taken from said order adjudging said person liable to pay said expenses in like manner as in misdemeanor cases. If the child have an estate in the hands of guardian or trustee, the guardian or trustee may be required to pay for its education and maintenance in connection therewith so long as there may be funds for that purpose." (Code, § 1912, as amended by Acts 1922.)

(8) *Physical and mental examinations.*—"The court, in its discretion, either before or after a hearing, may cause any child within its jurisdictions to be given a physical and mental examination by a competent physician or physicians or an approved mental examiner, to be designated by the court having jurisdiction of such child, and the physician or mental examiner so designated shall certify to the court the condition in which he finds the child. If it shall appear to the court that any child within its jurisdiction is mentally defective, he may cause the child to be examined by two licensed physicians or approved mental examiners, and on the written statement of such physicians or examiners that it is their opinion that the child is mentally defective, the court may commit such child to an institution authorized by law to receive and care for mentally defective children. The parent or parents, guardian and custodian of such child shall be given due notice of any proceeding hereunder as provided for in section nineteen hundred and eight. When the health or physical condition of the child requires it, the court may cause the child to be treated by a competent physician or placed in a public hospital or other institution for treatment or special care, or in a private hospital or institution which will receive it for like purposes." (Code, § 1913, as amended by Acts 1922.)

(9) *Detention homes or other places of detention.*—
“Provision shall be made for the temporary detention of children coming within the provisions of this chapter in a detention home or parental school to be conducted as an agency of the city or county for that purpose, or the judge of such court may, with the approval of the governing body of the city or board of supervisors of the county, arrange for the boarding of such children temporarily in a private home or homes in the custody of some fit person or persons subject to the supervision of the court, or the judge may arrange with any incorporated institution, society, or association, approved by the State Board of Public Welfare, or with any other court, which maintains a suitable place of detention for children for the use thereof as a temporary detention home, but the court or justice shall not send any child to a jail or station house while awaiting trial or disposition unless such child is extremely vicious or unruly or is charged with delinquency of an aggravated nature.

“In the event that a detention home or parental school is established by the court it shall be subject to visitation and inspection by the State Board of Public Welfare, and shall be furnished and carried on so far as possible as a family home under the management of a superintendent or matron. The court shall appoint such superintendent or matron from a list of eligibles submitted by the State Board of Public Welfare, and it may appoint such other employees for such home as may be necessary. The necessary expenses incurred in maintaining such detention home shall be a charge upon the county or city as the case may be, and the county board of supervisors or the city council or other governing body shall make provision therefor.

“In case the court shall arrange for the boarding of children temporarily detained in private homes or with any incorporated institution, society or association, or in detention homes conducted by another city or county, a reasonable sum for the board of such children while so detained shall be, upon the order of the court, paid by the county or city as the case may be. No child shall be detained or confined in a city or county almshouse or poor house for a period longer than thirty days without the consent of the State Board of Public Welfare.

"The same fees or allowances shall be paid by the State for children boarded out or held in a detention home as are now paid for prisoners confined in jail.

"Nothing in this section shall be construed as limiting the power of the court to require the parent or parents of the child to pay or contribute to the board and other expenses of caring for such child as provided in section nineteen hundred and twelve." (Code, § 1914, as amended by Acts 1922.)

(10) *Probation officers; appointment, duties and powers.*

—"The court may appoint one or more suitable persons as probation officers, in accordance with the terms of chapter 349 of the Acts of 1918, or any amendment thereof (see *Probation Officers*), whose duty it shall be to make such investigation of cases involving children under the age of 18 years as the court may direct, either before or after a hearing, to be present in court in order to represent the interests of the child when the case is heard, to furnish the court such information and assistance as it may require, and to take charge of any such child before and after the hearing as may be directed by the court, and to perform such other duties as the court may confer upon him. Every probation officer appointed under said chapter is hereby invested with all the powers and authority of a police officer and of a constable. The compensation of such probation officers shall be fixed by the board of supervisors of the county or the council or other governing body of the city in which they serve, and shall be paid out of the county or city treasury." (Code, § 1915, as amended by Acts 1922.)

(11) *Police officers and constables as probation officers.*

—"Any court mentioned in section 1905 (see (1), above) may, upon the recommendation of the State Board of Public Welfare, appoint and deputize any member or members of the police force of a city or of an incorporated town, not exceeding three in number, and any constable or other suitable person of the magisterial districts of a county, to act and serve as probation officer or officers so long as the judge of such court may deem desirable. In cities of 25,000 inhabitants or over, a policeman so designated shall, while acting as such probation officer, receive the same salary as theretofore and be relieved of the ordinary detail duties of a policeman, but shall remain

subject to suspension or removal as before his designation. In counties, towns, and in cities of less than 25,000 inhabitants police officers or constables designated for probation duty under the provisions of this chapter shall not be relieved of the ordinary detail duties of his office except upon express order of the court making such designation. Where no appointment of a probation officer is made the chief of police of the city or town and the sheriff of the county is authorized and required to act as such probation officer. Every probation officer designated as aforesaid is invested with all the powers and authority of a constable.

"All persons so selected shall faithfully perform duties which may be prescribed for them by the court or by the State Board of Public Welfare. Such officer or officers so appointed shall receive no extra compensation over his or their regular pay, except that the local authorities of a city, town or county may, if they see fit, pay to such officer so designated such compensation as they may deem to be reasonable." (Code, § 1916, as amended by Acts 1922.)

(12) *Courts' advisory boards.*—"The judge of any court which has exclusive original jurisdiction of the trial of cases arising under this chapter may appoint a board of not less than 3 nor more than 15 citizens of the county or city, known for their interest in the welfare of children, who shall serve without compensation, to be called the advisory board of said court; provided, that in counties or cities wherein county or city boards of public welfare may be appointed such boards shall constitute the advisory board of the court for such county or city in relation to matters arising under this chapter. Said advisory board at its first meeting shall organize by electing officers, and adopting such by-laws, rules and regulations for its government as it may deem proper. The members of said board shall hold office during the pleasure of the court or the judge thereof. The duties of the board shall be as follows: (1) To advise and co-operate with the court upon all matters affecting the workings of this chapter and other laws relating to children, their care and protection, and to domestic relations; (2) to visit as often as they conveniently can institutions and associations receiving children under this chapter and to report to the court from time to time the conditions and surroundings of the children received by or in charge of any

such persons, institutions or associations; (3) to make themselves familiar with the work of the court under this chapter and make from time to time a report to the public of the work of said court." (Code, § 1917, as amended by Acts 1922.)

(13) *Fine may be imposed upon certain delinquent children as disciplinary measure; when children may be proceeded against as adults.*—"A fine not exceeding \$50 may be imposed upon delinquent children who are of working age as a disciplinary measure. All sums so ordered to be paid may be paid by the children in monthly or weekly instalments. Such children may also be required to make restitution for damages resulting from their wrongful conduct; or in lieu of a fine, the court may, in case any such child is placed on probation, require him to pay a fee for probation service not exceeding \$50, such fees to be accounted for by the judge or clerk of said court and paid monthly into the treasury of the city or county paying the salary of the probation officer.

"If at any time, after thorough investigation or trial of its various disciplinary measures, the court or the judge thereof is convinced that any delinquent child 14 years of age or over brought before it under the terms of this chapter, cannot be made to lead a correct life, and cannot be properly disciplined under the provisions of this chapter, the said child shall then be proceeded against as if he were over the age of 18 years, and may be committed to the county jail, or to any city jail or police station pending further proceedings, or admitted to bail." (Code, § 1918, as amended by Acts 1922.)

(14) *Interference with the probation officer, etc.; removing or concealing child; punishment.*—"It shall be unlawful for any person to interfere with or to obstruct any probation officer, policeman, constable, or other officer in the discharge of his duty under this chapter, or for any person to remove or conceal or cause any child to be removed or concealed in order that it may not be brought before court, or for any person to interfere with or remove or attempt to remove any child who is in the custody of the court or of an officer or who has been lawfully committed under this chapter. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not exceeding \$50, or imprisoned not exceeding 3 months, or both." (Code, § 1919, as amended by Acts 1922.)

(15) *Appeals*.—"An appeal may be taken by any party aggrieved, from any final order or judgment of the court in the case of any child coming within the provisions of this act, to the circuit court of the county or to any city court having equity jurisdiction, within 20 days after the entering of said order or judgment in said case. Proceedings in such cases in such courts shall conform to the equity practice, where evidence is taken *ore tenus* (orally), provided, however, than an issue out of chancery may be had as a matter of right upon the request of either party." (Code, § 1920, as amended by Acts 1922.)

(16) *Vacation powers*.—"The judge of any court which has exclusive original jurisdiction of the trial of cases of delinquent, dependent or neglected children is hereby authorized to perform in vacation any act or exercise any power under the provisions of the preceding sections of this chapter which might be done or performed by the court in term time." (Code, § 1922, as amended by Acts 1922.)

(17) *Liberal construction of chapter; constitutionality*.—"This chapter shall be liberally construed in order to accomplish the beneficial purposes herein sought. Should any part of this chapter be declared to be unconstitutional by the Supreme Court of Appeals of this State or by the United States Supreme Court, such decision shall not affect the remainder hereof." (Code, § 1922, as amended by Acts 1922.)

§ 31. *Insane, epileptic, feeble-minded, or inebriate children*.—See *Insane, Epileptic, Feeble-Minded and Inebriate*.

§ 32. *Maternity or lying-in hospitals*.—For an act providing for the licensing, regulation, and inspection of maternity hospitals, and repealing §§ 1925-1930 of the Code, see Acts 1922, p.—.

§ 33. *Children placed in family homes*.—Acts 1922, p.—, repeals the Code provisions (§§ 1931-5), and passes an act entitled "an act to regulate child placing, and to provide for the licensing, visitation, supervision, inspection and regulation of agencies engaged in the business of receiving and caring for children or placing or boarding them in private homes."

§ 34. *Misdemeanor to sell, injure, overwork, beat, etc.*—By Acts 1922, p.—: "It shall be unlawful for any person to sell a child, or for any person employing or having the cus-

tody of any child, wilfully or negligently to cause or permit the life of such child to be endangered or the health of such child to be injured, or wilfully or negligently to cause or permit such child to be placed in a situation that its life or health or morals may be endangered, or to cause or permit such child to be overworked, tortured, tormented, mutilated, or cruelly beaten or cruelly treated. Any person violating this act shall be guilty of a misdemeanor," punishable by a fine not over \$500, and jail not over 12 months, or both (Code, § 4782).

§ 35. County or city may help poor children at home.—The county or city board of public welfare, or, if none exists, the juvenile and domestic relations court may order an allowance to the mother of needy or dependent children. See Acts 1922, p.—.

§ 36. Adoption of minors.—See *Adoption*.

§ 37. Other child-welfare laws.—(1) *Protecting institutions.*—For an act "to protect reformative, corrective and disciplinary institutions in this State, authorized by law to receive and have control of minors, in the discharge of the duties imposed on them, and to protect minors committed to, or held in, such institutions; also prescribing penalties for violations of this act," see Acts 1922, p.—.

(2) *Licensing, regulation, and inspection of children's boarding houses and nurseries.*—See Acts 1922, p. —.

(3) Providing "Occupational Therapy" (or remedies) for children in certain institutions.—See Acts 1922, p.—.

(4) *Desertion and Non-Support.*—See *Desertion and Non-Support*.

(5) *Juvenile and domestic relations court.*—See *Juvenile and Domestic Relations Courts*.

(6) *State and other bonds of public welfare.*—By Acts 1922, p. —, the State Board of Charities and Corrections is changed to State Board of Public Welfare. The act repealing §§ 1888 to 1902 of the Code is entitled "an act to continue the Board of Charities and Corrections under the name of State Board of Public Welfare; to provide for the composition and maintenance of said board; to prescribe its powers, duties and compensation; to provide how the officers, assistants and employees of the board may be appointed and compensated; to

authorize the board to create a children's bureau; to provide how county and city boards of public welfare must or may be appointed, with certain exceptions, and to prescribe the powers and duties of such local boards; to authorize such local boards to appoint local superintendents of public welfare, and to prescribe the powers, duties and compensation of such superintendents if and when appointed; also to repeal sections 1888 to 1902, inclusive, of the Code of Virginia."

Write the State Board of Public Welfare, Richmond, Va., for the Child Welfare Commission Code, embracing all the acts as to child welfare and children.

§ 38. Forms under Minors, Infants, or Children.—

No. 1. PETITION FOR PAYMENT OF MINOR'S MONEY TO PARENT

(Code, § 5343.)

Virginia:

In the _____ Court of _____.

In the Matter of—	}	Petition of the Infant Distributees.
Administratrix of the Estate of _____, deceased.		

To the Honorable _____, Judge of the _____ Court of _____:

Your petitioner, _____, respectfully represents:

1. That she is the widow of _____, who died in the _____ on the _____ day of _____, 192—.

2. The said decedent left surviving him as his sole distributees under the laws of the State of Virginia the aforesaid widow and two children by his marriage with her, to-wit: _____, aged _____ years, and _____, aged _____.

3. That on the _____ day of _____, 192—, your petitioner qualified in the _____ court of _____ as administratrix of the estate of the said decedent.

4. That the decedent left as his entire estate a bank account in the _____ Bank, _____, amounting to \$_____; and that lawful debts of the decedent together with taxes and necessary costs of the administration of the said estate have amounted to \$_____, leaving therefore the sum of \$_____ for distribution among the aforesaid lawful distributees, all of which appears by a copy of the account attached hereto marked "Exhibit A," the supervision of the administration of which fund is now under this court.

In consideration whereof your petitioner prays that the said _____, administratrix as aforesaid, be authorized to pay over to _____, mother of the said infants, the sum of \$_____ for the education, maintenance and support of her son, _____, and the sum of \$_____ for the education, maintenance and support of her son, _____. And she will ever pray, etc.

Petitioner.

Counsel.

No. 2. PETITION FOR SALE OF MINOR'S LAND

(Code, §§ 5335 (as amended by Acts 1922) seq.; Hurst's Forms, Nos. 322-30; Pollard's Biennial 1920, p. 247; Sand's Suit in Equity, pp. 548-71. This and following forms may be had in blank from Everett Waddey Company, Richmond, Va. These forms may easily be adapted to cases of insane persons, or trust estates.)

In the _____ court of the _____ of _____:
To the Honorable _____, Judge of the _____ Court of the
_____ of _____:

Humbly complaining, sheweth unto your honor your complainant _____, guardian of _____, infant children of _____, that he was appointed and qualified as the guardian of the said infants in your honor's court on the _____ day of _____, A. D., 192—, as will appear from a certificate of the clerk of the court showing the same, herewith filed marked "A" and prayed to be taken as a part of this bill. That the said infants are aged as follows: _____. That the said infants are the owners in fee-simple of the following real estate situated in the _____ of _____, viz.: _____. The said real estate was derived by said infants by _____.

That this is all the property, real or personal, which the said infants own except _____.

Your complainant thinks that the interests of his wards will be greatly promoted by a sale of the real estate first above mentioned, and investment of the proceeds in other property, as provided by the _____-statute of Virginia; and he thinks the following facts are calculated to show the property of such sale and investment: _____. And your complainant believes that the rights of no person will be violated by such sale and investment.

If the said infants were dead, the following persons would be their heirs or distributees, viz.: _____

In tender consideration of the premises, and forasmuch as your complainant is remediless therein, save in a court of equity, wherein such matters are cognizable and relievable, your complainant therefore prays that the said _____ infants under the age of twenty-one years, and _____ may be made parties defendant to this bill, and required to answer the same; the infants by their guardian *ad litem* to be assigned them, except that the infants over fourteen may be required also to answer in person and under oath, and the adults in proper person, though not under oath, which is hereby waived; that a guardian *ad litem* may be assigned the said infants to defend their interests in this suit, and who may also be required to answer the said bill under oath; that the said land may be decreed to be sold, and the proceeds invested as the court shall direct; that all proper allowances and counsel's fees may be made in this suit; that all proper accounts may be taken, inquiries directed, and such other and further and general relief may be granted, as to equity and good conscience may seem meet and proper. Let subpoenas go. And your complainant will ever pray, etc.

State of Virginia, _____ of _____.

I, _____, a notary public in and for the _____ aforesaid, do certify that _____, the complainant in the above suit, this day personally came before me in my _____ aforesaid, and made oath that he believes the several statements made in the foregoing bill to be true.

Given under my hand this _____ day of _____, A. D., 192—.
_____, N. P.

No. 3. ANSWER OF INFANT DEFENDANTS BY GUARDIAN AD LITEM AND OF GUARDIAN AD LITEM

(*Idem.*)

In the _____ court of the _____ of _____:

The answer of _____, infants under the age of twenty-one years by _____ (a discreet and competent attorney at law), their guardian *ad litem* assigned to defend them in this suit, and the answer of the said _____ guardian *ad litem* of the said infant defendants, to a bill of complaint exhibited against the said infants and others by _____, in the _____ court of the _____.

For answer to the said bill the said infant defendants, by their said guardian *ad litem*, answer and say that being of tender years they do not know what their true interests are in relation to the subject-matter of the said bill, nor do they know whether the statements therein contained are true or not. They confide the protection of their interests to the care of the court. And the said guardian *ad litem* of the said infant defendants for answer to the said bill, answers and says that he knows nothing as to the truth or falsity of the statements in the bill contained. He prays full protection for the infant defendants. And now, having fully answered, these defendants pray to be hence dismissed, with their costs, etc.

_____ } By _____ Guardian *ad litem*.

_____ Guardian *ad litem* of the said infants.

State of Virginia, _____ of _____.

Sworn to before me in my _____ aforesaid by _____, guardian *ad litem* as aforesaid, this the _____ day of _____, A. D., 192—.
_____, N. P.

No. 4. ANSWER OF INFANT DEFENDANTS OVER FOURTEEN.

(*Idem.*)

In the _____ court of the _____ of _____:

The answer, under oath, of _____, infants under the age of twenty-one, but over the age of fourteen years to a bill of complaint exhibited against them and others by _____, in the _____ court of the _____ of _____.

For answer to the said bill these defendants say that _____ years of age; that they, by reason of their tender years, know

nothing of the allegations of the said bill; so far as they do know they believe the same to be true, and they see no reason why the prayer of bill should not be granted, and accordingly they concur therein, but they rely upon the court to protect their interests. And now, having fully answered, they pray to be hence dismissed with their costs. And they will ever pray, etc. _____.

State of Virginia, _____ of _____.

Sworn to before me in my _____ aforesaid by _____ this _____ day of _____, A. D., 192—.

_____, N. P.

No. 5. ANSWER OF ADULT DEFENDANTS

In the _____ court of the _____:

The joint and separate answer of _____ to a bill in equity exhibited against them and others in the _____ of _____ by _____.

These respondents saving and reserving, etc., for answer to the said bill say that they believe the statements therein made are true. These respondents do not object to the sale of the land as prayed for in the said bill; they concur in the prayer of the said bill _____

And now having fully answered, they pray to be hence dismissed with their costs, etc.

[Signed] _____.

Affidavit to foregoing answer waived.

_____, Counsel for Complainant.

No. 6. DECREE OF REFERENCE

(*Idem.*)

In the _____ court of the _____ of _____:

_____, Complainant, }

vs. }

_____, Defendants. }

This day came _____ guardian, and by leave of court filed his b verified by his oath thereto, and the exhibits therewith; and on his motion _____, a discreet and competent attorney at law, is assigned as the guardian *ad litem* to the infants _____, to defend their interests in this suit; and thereupon the said guardian *ad litem* filed the answer of the said infant defendants, and his own answer on oath, to the bill of the complaint; and the said _____ infants over fourteen years of age, filed their own answer to the said bill; and _____ the adult defendants, filed their own answer to the said bill; to which several answers the complainant replied generally; and thereupon, by consent of all the parties, by counsel, this cause is set for hearing and docketed; and by like consent came on this day

to be heard on the bill of complaint and exhibits therewith, the several answers of the defendants to said bill as above set out, and the general replication of the complainant to every one of said answers, and was argued by counsel.

On consideration whereof, the court doth adjudge, order and decree that this cause be referred to one of the commissioners of this court, who is directed to inquire and report to the court, as follows:

1. Of what estate, real and personal, the infant defendants —— are possessed and entitled, and what their respective shares or interests therein, where such estate is situated, and what is its fee-simple and annual value;

2. Whether the interests of the said infant defendants will be promoted by a sale of the real estate in the bill mentioned, or any part thereof, and an investment of the proceeds of sale in other property.

3. Whether the rights of any person will be violated by such sale and investment;

4. Who would be the heirs at law or distributees of the said infant defendants if they were dead, and whether all such persons are properly before the court in this cause;

5. What will be a fair compensation to be allowed to the counsel for the complainant out of the proceeds of sale of the infants' land for their services in instituting and conducting this suit.

Which said inquiries the said commissioner shall make, after first giving notice of the time and place thereof to all parties, or their counsel, and report the same to the court, along with any matter specially stated deemed pertinent by himself or required by any party to be so stated.

No. 7. COMMISSIONER'S NOTICE

(*Idem.*)

In the —— court of the —— of ——:

——, Complainant

vs.

——, Defendants.

[Extract from decree entered ——, 192—:]

“*** The court doth adjudge, order and decree that this cause be referred to one of the commissioners of this court, who is directed to inquire and report to the court as follows:

1. Of what estate, real and personal, the infant —— are possessed or entitled, and what are their respective shares or interests therein, where such estate is situated, and what is its fee-simple and annual value;

2. Whether the interests of the said infant defendants will be promoted by a sale of the real estate in the bill mentioned, or any part thereof, and an investment of the proceeds of sale in other property.

3. Whether the rights of any person will be violated by such sale and investment;

4. Who would be the heirs at law or distributees of the said infant defendants if they were dead, and whether all such persons are properly before the court in this cause;

5. What will be a fair compensation to be allowed to the counsel for the complainant out of the proceeds of sale of the infants' lands for their instituting and conducting this suit.

Which said inquiries the said commissioner shall make after first giving notice of the time and place thereof to all parties, or their counsel, and report the same to the court, along with any matter specially stated deemed pertinent by himself or required by any party to be so stated."

Office of Commissioner ———, Va., ———, 192—.

To the parties to the above suit:

I have fixed on ———, the ——— day of ———, 192, at ——— o'clock ——— M., as the time and my office aforesaid as the place for executing the decree of which the foregoing is an extract. Given under my hand as commissioner in chancery of the ——— court of the ——— of ———, the day and year aforesaid.

———, Commissioner.

We hereby acknowledge legal service of the above notice.

———, Counsel for the Complainant and Adult Defendants.

———, Guardian *ad litem* of the Infant Defendants.

No. 8. THE DEPOSITIONS.

(*Idem.*)

The depositions of ——— and others, taken on the ——— day of ———, 192—, before ———, a commissioner in chancery of the ——— court of the ——— of ———, at his office, No. ———, in the ——— of ———, state of Virginia, to be read as evidence in a certain suit depending in the said court under the general style of ——— Guardian, etc., vs. ———, et als., and referred to the said commissioner for certain inquiries, accounts and reports.

Present, Mr. ———, Counsel for the Complainant and the Adult Defendants.

Mr. ———, Counsel for ———.

Mr. ———, Guardian *ad litem* of the Infant Defendants.

———, having been first duly sworn, deposes as follows, to-wit:

1. Question by Mr. ———, counsel for the complainant, etc. State your age, residence and occupation.

Answer: ———.

2. State whether or not you are acquainted with the real estate belonging to the infant defendants, described in the bill. If yea, how long you have known the same, and what have been your opportunities for knowing the same? What is the fee-simple and annual values thereof?

Answer: I am acquainted with the said real estate, having known the same for _____ years. It consists of _____. The fee-simple value is \$_____; the annual value, \$_____.

3. State whether or not, in your opinion, the interests of the infant owners will be promoted by a sale of the same, and an investment of the proceeds in other property. Will the interest of any person be violated by a sale and an investment of the proceeds?

Answer: I think their interests will be promoted by a sale, for the reasons that _____, etc.

No. 2. COMMISSIONER'S REPORT

In the _____ court of the _____ of _____:

_____, Complainant, }
vs.
_____, Defendants. }

Office of Commissioner _____, of _____, 192—.

To the Hon. _____ Judge of the _____ court of the _____ of _____.

In pursuance of a decree of your honor's court, entered in the suit of which the above is the general style, on the _____ day of _____, 192—, I gave notice to the parties that on the _____ day of _____, 192—, at 11 o'clock a. m., and at my office aforesaid, I should proceed to execute the said decree. The said notice, with service of the same acknowledged by the counsel for the complainant and the adult defendants and the guardian *ad litem* of the infants, is herewith returned.

I attended at the time and place so appointed, and in the presence of _____, of counsel for the complainant and the adult defendants, and of Mr. _____, the guardian *ad litem* of the infant defendants, I took the depositions of _____

1. The infant _____ defendants _____ are possessed of or entitled to the following property, viz.:

- (1) Real estate _____
- (2) Personal estate _____

Their shares or interest therein are _____ each.

The fee-simple value of the same is \$_____, and its annual value is _____ gross, \$_____ net after the payment of taxes, insurance, agent's commissions and repairs.

2. The interests of the said infants will be promoted by a sale of the said real estate and an investment of the proceeds thereof in other property.

3. The rights of no person will be violated by such sale and investment.

4. _____ would be the heirs at law or distributees of the said infants if they were dead. Such persons are properly before the court in this cause.

5. I consider that the sum of \$_____ would be reasonable and fair compensation to be allowed Messrs. _____, the counsel for the complainant and the adult defendants, for their services in instituting

and conducting the proceedings in this suit through its successive stages.

Respectfully submitted,

_____, Commissioner.

Commissioner's fee, \$_____.

No. 10. DECREE CONFIRMING REPORT OF COMMISSIONER AND DIRECTING
SALE

In the _____ court of the _____ of _____:

_____, Complainant,
vs.
_____, et als., Defendants, }

This cause came on this day to be again heard on the papers formerly read, and on the report of commissioner _____, dated _____, 192—, and filed on _____, 192—, to which report there is no exception taken, the counsel for the adult parties and the guardian *ad litem* for the infant defendants, by endorsement on said report, having waived the ten days for exception, and on the depositions of witnesses returned with the said report, and was argued by counsel.

On consideration whereof, it being clearly shown from said report and the evidence returned therewith, independently of any admissions in the answers, that the interests of the infant defendants will be promoted by a sale of the real estate hereinafter mentioned and a reinvestment of the proceeds thereof in other property, and the court being of opinion that the rights of no person will be violated thereby, the court doth approve and confirm said report; and doth adjudge, order and decree that _____, who are hereby appointed special commissioners for the purpose, any one of whom may act, do, after having advertised the time, place and terms of sale for five successive times in some newspaper published in the _____ of _____, proceed to sell in one or more parcels, as the commissioners shall see fit, at public auction, the land in the bill and proceeding mentioned, viz.: _____ upon the terms of one-third in cash, and the residue in three equal instalments, payable respectively at six, twelve and eighteen months from the day of sale, the credit instalment to be evidenced by notes of the purchaser, with six per centum per annum interest from the day of sale added, and the title of the property retained as security for the said notes until the whole of the purchase money is paid, and a conveyance directed by the court. And the said commissioners are directed to deposit the said notes and the cash instalment in the _____ bank of _____, to the credit of the court in this cause, and to report their proceedings hereunder to the court, returning therewith a certificate of deposit of such notes and cash.

But the said commissioners shall have no power to execute this decree until they, or the ones who act, shall enter into bond with sufficient security in the clerk's office of this court, payable to the commonwealth of Virginia, in the penalty of \$_____, and conditioned for the faithful discharge of their duties hereunder.

MISPRISON

It is the duty of every citizen knowing a felony to have been committed to inform a justice of the fact. Silently to observe the commission of an offense is misprison. Misprison is a misdemeanor, punishable by statute (§ 4782) by a fine not over \$500, or jail not over 12 months, or both. (See *Bouvier's Law Dictionary*, title *Misprison*.)

MONOMANIA

See *Insane*, etc.

Monomania is insanity upon a particular subject only and with a single delusion of mind. The most simple form of this order is that in which the patient has imbibed some single notion, contrary to common sense and to his own experience, and which seems, and no doubt really is, dependent on errors of sensation. It is supposed the mind in other respects retains its intellectual powers. In order to avoid any civil act done or criminal responsibility incurred, it must manifestly appear that the act in question was the effect of monomania. (See *Bouvier's Law Dictionary*.)

MORTALITY TABLE

Following is what is known as the Carlyle Table showing the expectation of life of persons of any age from nine to eighty years inclusive. It is used largely in ascertaining the value of life estates, and is accepted by courts as evidence in fixing such value. It is useful also in ascertaining pecuniary loss in case of a death caused by negligence.

MORTALITY TABLE

1861

Age.	Expectation of Life.	Age.	Expectation of Life.
9	50.00	45	24.50
10	49.00	46	24.00
11	48.00	47	23.25
12	47.25	48	22.50
13	46.50	49	22.00
14	45.75	50	21.25
15	45.00	51	20.50
16	44.25	52	19.25
17	43.50	53	19.00
18	43.00	54	18.25
19	42.25	55	17.75
20	41.50	56	17.00
21	40.75	57	16.25
22	40.00	58	15.50
23	39.50	59	15.00
24	38.75	60	14.50
25	38.00	61	14.00
26	37.25	62	13.50
27	36.50	63	13.00
28	35.75	64	12.50
29	35.00	65	11.75
30	34.25	66	11.25
31	33.75	67	10.75
32	33.00	68	10.25
33	32.50	69	9.75
34	31.75	70	9.25
35	31.00	71	8.75
36	30.50	72	8.25
37	29.75	73	7.75
38	29.00	74	7.50
39	28.25	75	7.00
40	27.75	76	6.75
41	27.00	77	6.50
42	26.50	78	6.00
43	25.75	79	5.75
44	25.25	80	5.00

MORTGAGE

See Chattel Mortgage; Deed of Trust; Recordation or Registry

- § 1. Definition; distinguished from deed of trust and chattel mortgage
- § 2. Equity of redemption and foreclosure defined
- § 3. Conveyance absolute on its face may be shown to be a mortgage
- § 4. Mortgage distinguished from pledge or pawn
- § 5. Mortgage distinguished from conditional sale
- § 6. Equitable mortgages
- § 7. Character of mortgagor's estate before and after default
- § 8. Character of mortgagee's estate before and after default
- § 9. Other matters applicable to mortgages and deeds of trust
- § 10. Forms under "Mortgage"

§ 1. **Definition; distinguished from deed of trust and chattel mortgage.**—A mortgage is a conveyance by a debtor (called mortgagor) to a creditor (called mortgagee,) on condition to be void if a named sum of money be paid, or some other act be done, by a designated time, the intention being to secure the debt or the doing of the act; and it differs from a deed of trust, which conveys to a third person, a trustee, who executes the trust, while a mortgage is executed by foreclosure proceedings (or sale) in court. (1 M's Real Prop., §§ 596, 610.)

If the conveyance is of personal property only, it is called a chattel mortgage—see *Chattel Mortgage*.

§ 2. **Equity of redemption, and foreclosure defined.**—It is the right which the mortgagor of an estate has, in equity, of redeeming it, or having it re-conveyed back (with rents and profits), after it has been forfeited at law by non-payment of the money secured, at the time appointed, by paying within a reasonable time the amount of the debt, interest, and costs. And this right of redemption may be asserted not only by the mortgagor, his heirs, personal representative, or assignees, but by all persons claiming any interest in the premises, as against the mortgagor. It may, like any other estate, be conveyed, willed, mortgaged, charged with debts, and be subject to curtesy or dower; but such estates are cognizable alone in equity, and cannot be sub-

jected to debts, at law. On the other hand, the mortgagee, as soon as default is made, may, in equity, require the mortgagor to redeem his estate presently, or else to be forever foreclosed or barred from redeeming the same, which, proceeding is called foreclosing the mortgage, and by the Virginia practice consists in selling the property to pay the debt and costs, returning any surplus to the debtor. (1 M's Real Prop., §§ 599-600, 633.)

§ 3. Conveyance absolute on its face may be shown to be a mortgage.—If it can be discerned or proved by oral testimony that the conveyance was intended to secure the payment of money it is a mortgage, with an equity of redemption. A conveyance absolute (instead of conditional), on its face may thus be shown by oral evidence (if clear and convincing) to be a mortgage. Neither can an equity of redemption be defeated by an agreement in the mortgage waiving it. (1 M's Real Prop., § 601.)

§ 4. Mortgage distinguished from pledge or pawn.—A pledge or pawn is, necessarily of movable personal property; a mortgage may be of either real or personal estate. In a pledge, the general property or title does not pass, but only a special property or right to hold, and to sell at public auction, if the money be not paid upon giving reasonable opportunity to the debtor to redeem, and notifying him of the time and place of sale (Code, §§ 6449-50); a mortgage vests the legal title conditionally in the mortgagee, and if the condition is not performed, the title becomes absolute at law, but redeemable in equity. (1 M's Real Prop., § 604.)

§ 5. Mortgage distinguished from conditional sale.—A conditional sale is not, like a mortgage, a security for money, but is a sale in good faith, yet on condition that the seller may re-purchase on certain terms, which must be strictly complied with. So there is not, as in a mortgage, any equity of redemption; yet it is often attempted, as is admissible, to show by oral evidence that security for money was intended, and the writing therefore a mortgage, with the right of redemption, which may be asserted in a reasonable time after default; if, however, it appears to be a conditional sale, punctual performance cannot be dispensed with:

doubtful cases are generally declared mortgages. The character of the transaction is fixed at its inception and is not affected by subsequent events unless they amount to a new contract. The marks distinguishing a mortgage, from a conditional sale are: (1) That no price, or an inadequate one, is set on the property; (2) that the grantor remains in possession, which is not usual in the case of a conditional sale; (3) that there is a covenant or promise obliging the grantor to buy back the property or re-pay the money, which is incompatible with the idea of a conditional sale; and (4) that the conveyance does not extinguish the debt (see section 2, above); if there be no debt, or the conveyance extinguishes the debt, an agreement then or thereafter with the debtor or grantor, giving him an opportunity, to re-acquire the title, is a conditional sale. (1 M's Real Prop., §§ 605-9.) See, also, *Conditional Sale or Reservation Title or Lien*.

§ 6. Equitable mortgages.—Even where there is no conveyance at law, equity recognizes as a mortgage a mere promise in writing to subject property to debts, a power of attorney to the creditor authorizing him to sell to pay a debt, deeds imperfectly executed (as, where a trustee's name is left out of a deed of trust or he is or becomes a creditor), a conveyance to a third person in consideration or on condition of his paying a certain debt of the grantor, and other agreements in a writing, expressed or implied, to hold or to transfer lands as a security for money, equity looking upon that as done which ought to be done. A deposit of the title deeds to land, creates a mortgage, perhaps, as between the parties, but not as to others. (1 M's Real Prop., §§ 613-16.)

§ 7. Character of mortgagor's estate before and after default.—Where the mortgage provides, as is usual, for the mortgagor's possession until default, he is until then a tenant for years; after default, tenant at will or by sufferance: where there is no such provision, he is a tenant at will or by sufferance, before and after default. But in no case, after default, is he entitled to the annual away-going crops. (1 M's Real Prop., §§ 618-19.)

If the mortgage is paid off within the time stipulated, the land returns to the mortgagor without a re-conveyance; if paid afterwards, a re-conveyance is necessary, but marking

satisfied in the margin of the deed book operates a re-conveyance—see section 14, below.

§ 8. Character of mortgagee's estate before and after default.—Before default, at law, the mortgagee has always the legal estate, with the right to the possession or not, according to the provisions of the mortgage; and hence he, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards (see Code, § 5514): but, in equity, the mortgagee is a trustee for mortgagor, and, if in possession, must account for rents and profits or waste committed by him, with a lien on the premises for his debt, yet obliged to yield possession and re-convey, if the money be paid as agreed, or within a reasonable time.

After default, at law the mortgagee is for all purposes the legal owner of the land, entitled to the possession: but, in equity, he is a mere trustee for the mortgagor, accountable for rents and profits, and for waste, but to be allowed for expenses actually incurred, yet no compensation for his trouble. (1 M's Real Prop., §§ 627-8.)

§ 9. Other matters applicable to mortgages and deeds of trust.—See *Deed of Trust*, section 6 (debt accrued, howsoever evidenced); 7 (limitation of enforcement); 8 (assignment of debt secured); 9 (effect of conveyance of property to another); 10 (priority of liens); 11 (effect of foreign encumbrance); 12 fraudulent sale, pledge, or removal of encumbered property); 13 (satisfaction as defense to ejectment); 14 (encumbrance given on "poor law" exemption is void); 16 (satisfaction or release of encumbrance); 16 (rec-ordation).

§ 10. Forms under "Mortgage."

No. 1. MORTGAGE OF LAND

This indenture, made this day of —, 192—, bewteen D. D., of —, of one part, and C. C., of the other part. Whereas, the said D. D. stands indebted unto the said C. C., in and by a certain writing obligatory, under his hand and seal, bearing even date herewith, in the sum of — dollars, in gold, with interest thereon, after the rate of — per centum per annum from the — day of —, in the year 192—, until paid, to be paid to the said C. C., on the — day of —, in the year 192—, as by the said writing obliga-

tory, reference being thereunto had, will more fully and at large appear, which said sum of ——— dollars, in gold, with the interest thereon, as aforesaid, the said D. D. binds himself and his heirs to pay, when the same is due to the said C. C., or his assigns. Now, this indenture witnesseth, that the said D. D., as well for and in consideration of the aforesaid debt of ——— dollars, and for the better securing the payment thereof, with its interest, unto the said C. C., and his assigns, as of the further sum of one dollar to him in hand paid by the said C. C., at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth grant, bargain, sell, release, and confirm unto the said C. C. his heirs and assigns forever, all that tract or parcel of land, situate and lying in ———, known by the name of ———, containing by estimation ——— acres, be the same, however, ever so much more or less, and bounded as follows to-wit: Beginning at [describe the boundaries]; together with all the appurtenances to the said tract or parcel of land belonging, or in any wise appertaining; to have and to hold the said parcel or tract of land, with its appurtenances as aforesaid, unto the said C. C., his heirs or assigns, forever. And the said D. D., for himself and his heirs, doth covenant and agree with the said C. C., his heirs and assigns, that the said D. D., and his heirs, will forever warrant and defend the title to the said tract or parcel of land, with its appurtenances, unto the said C. C., and his heirs or assigns, free from the claims of all persons whatsoever; PROVIDED ALWAYS nevertheless, and UPON CONDITION, that if the said D. D., his heirs or assigns, shall well and truly pay unto the said C. C., or his assigns, the aforesaid debt of ——— dollars, in gold, on the day hereinbefore mentioned, and appointed for the payment thereof, with interest for the same as aforesaid, without fraud, defalcation or deduction, then and from thenceforth as well this present indenture, and the estate hereby granted, as the said recited writing obligatory, shall cease, determine, and become absolutely null and void to all intents and purposes, anything hereinbefore contained to the contrary, in any wise, notwithstanding.

Witness the hands and seals of the parties, the day and year first above written.

D. D. [SEAL.]

C. C. [SEAL.]

NO. 2. MORTGAGE OF PERSONAL PROPERTY OR CHATTEL MORTGAGE

[See under section 6, title *Chattel Mortgage*.]

NO. 3. APPLICATION TO COURT TO HAVE MORTGAGE MARKED SATISFIED

[See Nos. 6 to 8, under *Deed of Trust*.]

MOTION PICTURE FILM LAW

For an act "To regulate motion picture films and reels; providing a system of examination, approval and regulation thereof, and of the banners, posters and other like advertising matter used in connection therewith; creating the board of censors; and providing penalties for the violation of this act," see Acts 1922, p. —.

MOTIONS FOR MONEY

(See "*Burk's Pleading & Practice.*" (*New ed.*))

- § 1. Motion for debt, damages, or tort, in lieu of action
 - (1) Statute giving jurisdiction
 - (2) Scope of statute
 - (3) The notice; bill of particulars
 - (4) The defense
 - (5) Against whom of those liable judgment may be given
 - (6) When trial by jury
- § 2. Motion on bonds taken or given by officers
- § 3. Motion against officer, or by officer or surety against deputy
- § 4. Motion by surety or bail against principal
- § 5. Motion by client against attorney
- § 6. Various forms of notice under "Motions for Money"

§ 1. Motion for debt, damages, or tort in lieu of action.—

(1) *Statute giving jurisdiction.*—By section 6046 of the Code, as amended by Acts 1922:

"Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion before any court which would have jurisdiction of such action, after not less than 15 days' notice, which notice shall be in writing, signed by the plaintiff or his attorney, and shall be returned to the clerk's office of such court within 5 days after service of the same, and when so returned shall be forthwith filed and the date noted thereon, and shall be docketed on the return day thereof. But the notice shall not be sent out of the county or city in which the judgment is to be asked except in those cases in which process can be so sent out under the provisions of sections 6055 and 6056 (see (3) below). The return day

of a notice under this section shall not be more than ninety days from its date, unless the commencement of the next succeeding term of the court be more than ninety days from such date, in which case the return day may be some day of such term.

"The defendant may make the same defenses to the notice as to a declaration in an action at law, and in the same manner, or he may state his grounds of defense informally in writing, and in the latter event the parties shall be deemed to be at issue on the grounds stated without replication or other pleading on the part of the plaintiff. No plea in abatement under this section shall be received after the defendant has demurred, pleaded in bar or filed such statement of his grounds of defense.

"If the motion be upon an account the plaintiff shall file with the notice an account, stating distinctly the several items of his claim, unless they be plainly described in the notice, and if the plaintiff file with such account an affidavit such as is prescribed by section 6133, on the part of the plaintiff in an action of assumpsit, no plea in bar or defense to the merits shall be received on the part of the defendant unless accompanied by such affidavit as is prescribed by the last mentioned section on the part of the defendant in an action of assumpsit. If such plea and affidavit be not filed by the defendant, the plaintiff shall, upon motion made in open court, be entitled to a judgment for the amount claimed in the affidavit filed with his notice, and no further proof of the plaintiff's claim shall be necessary. If such plea or defense and affidavit be filed and the affidavit admits that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit by the plaintiff, judgment may be taken by the plaintiff for the sum so admitted to be due, and the case be tried as to the residue.

"Upon any motion under this section the same rules shall apply with reference to bills of particulars and grounds of defense, as are now provided by law in other actions or motions."

(2) *Scope of statute.*—The remedy by motion is now as broad as that by action, thus embracing all manner of

claims, not only for money but for property, and the terms of the statute (though that perhaps was not the intention of the Revisors of the Code 1919, who gave the statute its present unlimited scope?) is broad enough to embrace any claim to real as well as personal property, and so substituting motion for ejectment, unlawful detainer, detinue, and trover and conversion. It clearly embraces any claim to any debt, fine, penalty, or other money, or damages for breach of any contract, or for violation of any statute, a claim to specific personal property, or for any injury to property, real or personal, or any injury to the person (as, assault and battery, wounding or maiming, or death by wrongful act), or to the reputation (as, by slander or libel) or for violation of one's liberty (as, by false imprisonment or malicious prosecution),—indeed any case where one is “entitled to maintain an action at law,” whether upon a contract, express or implied, or for a tort (see *Torts*), or, as the Revisors in their note to this section says, “to all cases, where an action at law of any kind (the last three words in caps) would lie,” they intending this procedure by motion as a “try-out” for common law pleading—see Code, 1919, p. XII.

(3) *The notice; bill of particulars.*—While the procedure by motion is intended to give a simpler, cheaper, and more expeditious remedy, yet the notice, taking the place of the writ and declaration, must inform the defendant in plain and unmistakable language of the ground of the claim. While the procedure by notice is looked upon with great indulgence, as the courts are loath to sacrifice substance to form, yet the notice must state the substance of a good ground of action (Chandler, 99 S. E. 794; Mankin, 105 S. E. 459; 105 Va. 459; 119 Va. 439).

If the notice is not sufficiently specific, the court may order a statement to be filed of the particulars of the claim, as the defendant may also be required to file the ground of his defense; and upon failure to comply, the court may exclude evidence of any matter not described in the notice so plainly as to give the defendant notice of its character (Code, §§ 6046, 6091).

In computing the time of a notice, the day of service is counted, but not the day it is filed in the clerk's office, as to

the 5 days' notice, nor the day the motion's to be made, as to the 15 days' notice. (Code, § 5, cl. 8; 103 Va. 495; 117 Va. 1.)

Where the motion is brought in a county or city on the sole ground that the cause of action, or some part thereof, arose therein, the notice shall not be executed in any other county or city, unless it be a motion against a corporation, or upon a bond taken by an officer under authority of some statute (see section 2, below), or to recover damages for a wrong (see *Torts*), or against two or more defendants on one of whom such notice has been executed in the county or city in which the motion is to be made. (Code, § 6056.)

"Process," in the statute, is synonymous with "notice," which is the process, in the cast of motions, to bring the "motion" or "action," these words also being synonymous (100 Va. 675; 102 Va. 37; 105 Va. 182).

For how a notice is served, see *Notice*.

(4) *The defense*.—The defendant may make the same defenses and in the same manner, as in case of an action at law, or he may state his grounds of defense informally in writing, and no reply or other pleading by the plaintiff is necessary; and as to a motion upon an account, and when court will order grounds of defense to be filed, see (1), above. Strict rules of pleading do not apply to proceedings by motion, which are very informal, except where the statute requires otherwise, as, a special plea of set-off, which must be formal and comply with the rules of pleading; but strict rules of pleading do not apply to the defense of set-offs, which may be proved without pleading them (99 Va. 273; 108 Va. 141; 112 Va. 443; 113 Va. 434).

(5) *Against whom of those liable judgment may be given*.—By section 6047 of the Code:

"A person entitled to obtain judgment for money on motion, may, as to any, or the personal representatives (administrators or executors) of any person liable for such money, move severally against each, or jointly against all, or jointly against any intermediate number; and when notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with the notice,

but the judgment against such personal representative shall in all cases, be several. Such motions may be made from time to time until there is judgment against every person liable, or his personal representative."

(6) *When trial by jury.*—By section 6048 of the Code: "On a motion, when an issue of fact is joined, and either party desire it, or, when in the opinion of the court, it is proper, a jury shall be impaneled, unless the case be one in which the recovery is limited to an amount not greater than \$20, exclusive of interest."

To entitle the defendant to a trial by jury, an issue must be made up, which may be tendered by a plea or by an informal statement in writing of the grounds of defense (see (4), above); a mere oral statement is not sufficient, and where a statute requires a plea to be verified by affidavit that must be done (91 Va. 583; 113 Va. 484).

§ 2. Motion on bonds taken or given by officers.—By section 6045 of the Code: "The court to which, or in, or to whose clerk or office, any bond taken by an officer, or given by any sheriff, sergeant, or constable, is required to be returned, filed or recorded, may, on motion of any person, give judgment for so much money as he is entitled, by virtue of such bond, to recover by action." See 4 Min. Inst. 1321-2.

The notice under this section is ten days (Code, § 6044).

For motion before a justice on a forthcoming bond taken by a constable or other officer upon an execution issued by him, with right of removal to court, where the amount in controversy exceeds \$20, see Code, §§ 6526-9; and *Forthcoming Bond*.

§ 3. Motion against officer, or by officer or surety against deputy.—See Code, §§ 2835-8, 6044; 4 Min. Inst. 1323-4.

§ 4. Motion by surety or bail against principal.—See Code, §§ 5777, 6044; 4 Min. Inst. 1323.

§ 5. Motion by client against attorney for money collected for him.—See Code, §§ 3427, 6044, and *Attorney and Client*, section 9.

§ 6. Various forms of notice under "Motions for Money."

MOTIONS FOR MONEY

No. 1. NOTICE OF MOTION, ON BOND, NOTE, CONTRACT, ACCOUNT, OR FOR TORT

(Code, § 6046; 2 Pollard's Code, p. 1689; 4 Min. Inst. 1769.)

To D. D.:

You are hereby notified that on the _____ day of _____, 192—, I shall move the _____ court of the _____ of _____ for a judgment against you for the sum of _____ dollars and _____ cents, with interest thereon from the _____ day of _____, 192—, until paid, the same being due to _____ from you, as evidenced by a certain promissory note (or *bond* or *account*), a copy of which is hereto attached (or other claim whether on a contract, express or implied, or for injury to person or property, or other tort—see sections 1, (2), above—specifying plainly and specifically the ground of the claim, or filing with the notice a bill of particulars—see 1, (3), above), for the sum of _____ dollars and _____ cents.

Given under my hand, this _____ day of _____, 192—.

A. T., p. q.

C. C., by Counsel.

County of _____, to-wit: _____

No. 2. ACCOUNT AND AFFIDAVIT THERETO

(Idem; Pollard's Code Biennial 1920, p. 275.)

Mr. D. D.:

In account with C. C.

192—.

Sept. _____

To 1 Pr. Shoes

[Here insert the other items.]

Dr.

3.00

County of _____, to-wit:

This day _____ personally appeared before me, J. T., a justice of the peace for the county aforesaid, in the State of Virginia, and made oath before me, in my said County, that he is the plaintiff (or *agent for the plaintiff*) mentioned in the foregoing notice and to the best of his belief the amount of his (or *the plaintiff's*) claim is the sum of _____ dollars and _____ cents, that such amount is justly due to the plaintiff from the defendant, and that the plaintiff claims interest thereon from the _____ day of _____, 192—. The several items, and the aggregate amount thereof, and the credits, so far as as the same exist, are distinctly stated in the account hereto attached.

Given under my hand this _____ day of _____, 192—.

J. T., J. P.

Append notice as in form No. 1.

No. 3. COUNTER AFFIDAVIT IN SUCH CASE
(*Idem*; Pollard's Code Biennial 1920, p. 276.)

In the Circuit Court of the County of _____, Virginia:

C. C., Plaintiff,

v.

D. D., Defendant.

This day personally appeared before me, J. T., a justice of the peace for the county aforesaid, in the State of Virginia, and made oath before me in my said county that he is the defendant (or *agent of the defendant*) in the above-entitled action, and that he verily believes that the plaintiff is not entitled to recover anything from the defendant on the claim asserted in said action (if the defendant wishes to admit a part of the claim he should add after the word "action" the words "save only the sum of \$_____, with interest from the _____ day of _____, 192—, which is all the said plaintiff is entitled to recover as aforesaid").

Given under my hand, this _____ day of _____, 192—.

J. T., J. P.

No. 4. NOTICE OF MOTIONS AGAINST OFFICER, OR BY OFFICER OR SURETY
AGAINST DEPUTY

[See Nos. 1 to 11, under *Sheriffs, Sergeants, Constables, etc.*]

No. 5. NOTICE OF MOTION BY SURETY AGAINST PRINCIPAL
(Code, §§ 5777, 6044; H's G. & M., p. 748.)

To Mr. S. S.;

Whereas on the _____ day of _____, 192—, at the suit of P. P., judgment was entered up for the sum of \$_____ against me as surety for you on a certain indemnifying bond (or other bond), executed on the _____ day of _____, 192—, and the amount of the said judgment was paid by me as such surety, on the _____ day of _____, 192—.

Notice is hereby given you, that on the first day of the next _____ term of the circuit court of said county, I shall move the said court for judgment against you for the full amount which has been paid by me as aforesaid, with lawful interest thereon from the time the same was so paid. This _____ day of _____, 192—.

No. 6. NOTICE OF MOTION BY CLIENT AGAINST ATTORNEY FOR MONEY
RECEIVED

(Va. Code 1887, §§ 3427, 6044; 4 Min. Inst 1770; Sand's Forms, 443.)

To Mr. A. A.:

The sum of _____ dollars having been received by you, as my

attorney, on the — day of —, 192—, from the sheriff of the county of —, under an execution sued out of the — court for the — of —, upon a judgment therein rendered on my behalf against one D. D., and payment of the money so received having been demanded of you, and you having failed and refused to pay the same when so demanded, notice is hereby given you, that on the — day of the next term of the — court for the — of —, I shall move the said court to render judgment against you for the money so received, and to award damages in lieu of interest, not exceeding — per centum per annum, from the time of your receiving the said money until it shall be paid.

Dated this — day of —, in the year 192—.

C. C.

MURDER

See Manslaughter

- § 1. Murder, first and second degrees, defined
 - (1) Effect of statute
 - (2) Definition of murder
 - (3) Justifiable homicide
 - (4) Excusable homicide
 - (a) Homicide by misadventure
 - (b) Excusable homicide in self-defense
 - (aa) Retreat of accused
 - (bb) Killing must be necessary
 - (cc) Right of self-defense extends to near relatives, etc.
 - (dd) Self-defense and manslaughter distinguished
 - (5) Murder and manslaughter distinguished
 - (6) Murder of second degree; instances of
- § 2. Punishment of murder
- § 3. Where prosecuted, if person dies out of State or county, or offense is committed near county boundary
- § 4. Form of "description" in warrant or indictment

§ 1. Murder, first and second degrees, defined.—"Murder by poison, lying in wait, imprisonment, starving, or any wilful, deliberate, and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery, or burglary, is murder of the first degree. All other murder is murder of the second degree." (Code, § 4393.)

(1) *Effect of statute.*—This statute defining the degree of murder in no manner alters the common law crime of murder, nor does it divide the crime into two offenses. It seeks only to graduate the punishment in proportion to the atrocity of the offense, and to that end assigns the crime two degrees. It is therefore not necessary to alter the form of the warrant or indictment for murder in any respect, nor to charge specifically, the facts showing the act to be murder of the first degree. As to any wilful, deliberate, and premeditated killing"—(1) the act must be such as on common law principles would be murder; (2) there must be an intention to kill—not necessarily to kill the person slain, but to kill some one—e. g., shooting at one and killing another; and (3) the killing must be "wilful" (i. e., on purpose), "deliberate" (i. e., on reflection), and "premeditated" (i. e., determined on before hand). But the required operation of the mind (viz., the reflection and premeditation) may take place in the shortest interval of time, even at the moment of committing, as well as a month before, and like any other fact may be proved by circumstantial evidence—such as excludes any reasonable doubt. A mortal wound given with a deadly weapon previously in the possession of the slayer, without any, or upon slight provocation, is *prima facie* wilful, deliberate, and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances. As to murder "by poison, lying in wait, starving," or "in the commission of or attempt to commit arson, robbery, or burglary," the act must likewise be such as on common law principles would be murder, and there need be no further proof of the intention to kill than the commission of the act itself affords. (H's G. & M., pp. 105-6.)

(2) *Definition of murder.*—At common law (and so under the statute), murder is the unlawful killing of any person in being, under the protection of the Commonwealth, with malice aforethought. All killing of human beings is unlawful, unless it be justified or excused. (H's G. & M., p. 191.)

(3) *Justifiable homicide.*—Homicide is justified where there is no blame. The following are instances of justifiable homicide: (1) Killing in defense of person or property; (2) killing in making arrests; (3) killing in execution of sen-

tence of death; (4) killing in lawful war. Killing is justifiable, under the first head, where the assailant manifestly intends, by violence or surprise, to commit a forcible or atrocious felony upon one's person, habitation or property; but only where, from the standpoint of the accused, the danger is apparently imminent, actual, and irremediable; and the accused must not have brought the necessity upon himself by his own misconduct; and he must not go further than the necessity which justifies him requires; as, killing after the danger is past, which is murder or manslaughter, according as there has been time to cool or not. This right of self-defense extends, also, to one's husband, wife, parent, child, master, or servant. Indeed, even a stranger may and ought to interpose to prevent the felony, and to that end may justify killing the aggressor. (H's G. & M., pp. 91-92.)

(4) *Excusable homicide*.—Homicide is excusable, but not justifiable, where there is some fault, error or omission in the party committing the deed, but so trivial as to exempt him from punishment, although not wholly from blame. Excusable homicide are of two kinds: (1) Excusable homicide by misfortune or misadventure; (2) Excusable homicide in self-defense.

(a) *Homicide by misadventure*.—Instances of homicide by misfortune or misadventure are: (1) Killing by misadventure in the exercise of one's lawful occupation, whether dangerous or not; as, from workmen throwing stones, timber, etc., from a house in the ordinary course of their business; from driving a vehicle or riding; from a physician or surgeon administering a medicine or performing an operation, but if grossly ignorant or inattentive, he is punishable for the result. (2) Killing by misadventure in using dangerous instruments, etc., as, in case of the lawful use of firearms, e. g., by shooting at lawful game, or at a mark, or by handling a gun supposing it to be unloaded; or laying poison for rats, whereby a man is killed. (3) Killing by misadventure in reasonable and lawful correction by parents, teachers, etc., but otherwise if the correction is immoderate. (4) Killing by misadventure in pursuit of innocent and lawful sports and recreations, but otherwise as to prize-fightings, cock-fightings, etc. (5) Killing by misadventure in seeking to prevent a

reasonably suspected felony, though no felony in fact was intended, but the party must have taken due care to ascertain the truth. (H's G. & M., pp. 93-94.)

(b) *Excusable homicide in self-defense.*—The killing here is supposed to have been committed upon a sudden affray in order to preserve one's own life. The distinction between self-defense which only excuses, and that which justifies, is as follows: The latter occurs when an attempt is made to commit a forcible and atrocious felony, the object being to prevent it; while self-defense which excuses occurs in the course of a sudden broil, by one's killing him who assaults him, in order to repel his assault, and being not blameless, is simply excusable. This is often called chance medley or chaud medley.

The right of self-defense in case of sudden broils can be exercised only in sudden and violent cases, when great, certain, and immediate suffering, and probably death, would ensue from waiting for the protection of the law. (H's G. & M., p. 95.)

(aa) *Retreat of accused.*—Before killing the accused must have retreated as far as he conveniently and safely can, in order to avoid the assault, and that not to invite a continuance of the assault, but from a real tenderness of shedding human blood. But in his own house one need not retreat, but the assault, as in other cases, must be immediately dangerous. If the party slaying made the first assault, he must quit the combat and retreat as far as he safely can. Otherwise no necessity will make the killing excusable, even though retreat is made impossible by the adversary's fierceness. He cannot allege a necessity, which he himself wrongfully occasioned. If parties fight by agreement, the defense of self-defense is not available. (H's G. & M., p. 95.)

(bb) *Killing must be necessary.*—The killing must have resulted from sheer necessity in order to avoid immediate death or great bodily harm. The necessity upon which the excuse rests must continue until the act is committed. For, if the one assaulted does not kill until the affray is over, it is revenge, and not self-defense, and the act is manslaughter or murder, according as there has been time to cool or not. (H's G. & M., p. 95.)

(cc) *Right of self-defense extends to near relatives, etc.*

—The principal civil and natural relations are comprehended mutually in the excuse of self-defense. Therefore, husband and wife, parent and child, master and servant, are excused for killing an assailant in the necessary defense of each other respectively. It is said that even a stranger may interpose to defend one in imminent danger of his life. (H's G. & M., p. 96.)

(dd) *Self-defense and manslaughter distinguished.*—In homicide in self-defense, the slayer does not begin the fight, or having begun it, endeavors to decline further combat and kills his adversary to save his own life; while in manslaughter the combat continues until the mortal stroke is given, or the perpetrator kills when not in immediate danger of his life. (H's G. & M., p. 96.)

(5) *Murder and manslaughter distinguished.*—Malice aforethought is the grand criterion which distinguishes murder from manslaughter, and consists of any formed design of doing mischief, whether arising from hatred and revenge against the deceased, or from perverse malignity and depravity of heart in general. When the killing is proved, the burden of proof is upon the accused to show circumstances of justification, excuse, or alleviation, or else it is murder, but of second degree. Every killing is *prima facie* murder, but the burden of proof is upon the prosecution to raise it to the first degree.

Malice is either express or implied. Express malice, or malice in fact is for the jury to determine; implied malice, or malice in law, is for the court to say. Express malice consists in a deliberate purpose to take the life of the person slain, or to do him some bodily harm, the intention being ascertained from external circumstances, as, by lying in wait, antecedent menaces, former grudges, etc. Malice is express where the homicide was committed (1) in a duel by arrangement or upon sudden quarrel or in mutual combat; (2) without any provocation or on a slight one; and (3) where slayer intended to hurt deceased in less degree.

Where homicide is committed without any or on slight provocation, malice is a *prima facie* inference from the very fact, for one must be presumed to have designed to do what

he did, or what is the immediate and necessary consequences of his act, unless he can show the contrary. Implied malice consists in any evil design in general, manifesting a wicked, depraved and malignant spirit, regardless of social duty and fatally bent on mischief; for instance:

(a) Where a person intending to commit felony happens to kill one whom he did not design to injure, e. g., one shooting at cattle intending to steal them, and accidentally killing a man, it is murder.

(b) When one is doing a very dangerous unlawful act, or a dangerous lawful act in a grossly improper manner, kills a person, e. g., discharging a gun into a throng of people; riding wilfully an unruly horse into a crowd; giving a woman medicine to produce abortion, etc., engaging with others in riot, etc., with the purpose to resist all opposers; workmen throwing timber, etc., from a house into a crowded street of a city, etc., these are cases of murder.

(c) Where one, in resisting the officers or their assistants in their duty, or private persons lawfully endeavoring to arrest felons or to prevent a breach of the peace, kills an officer, his assistant, or such private person, it is murder, on principles of public policy, in all who take part in their resistance. (H's G. & M., pp. 104-5.)

(6) *Murder of second degree; instances of.*—"All other murder," say the statute (§ 4398) "is murder of the second degree." For instance: (1) Killing by throwing timber, etc., into a crowded street, without warning, but having no design to kill any particular person; (2) shooting at cattle with intent to steal and accidentally killing a man; (3) killing officer by combatants upon officer attempting to part them; (4) killing in the sudden provocation of a gross insult, etc. (H's G. & M., pp. 106-7.)

§ 2. Punishment of murder.—"Murder of the first degree shall be punished with death, or by confinement in the penitentiary for life, or for any term not less than 20 years. Murder of the second degree shall be punished by confinement in the penitentiary not less than 5 nor more than 20 years." (Code, §§ 4394-5.)

§ 3. Where prosecuted, if person dies out of State or county, or offense is committed near county boundary.—See Code, §§ 4398, 4771-2.

§ 4. Form of "description" in warrant or indictment.—

No. 1. WARRANT FOR MURDER GENERALLY

(Code, §§ 4393-4.)

DESCRIPTION:

"with malice aforethought maliciously and feloniously did kill and murder one C. D."

In case of manslaughter omit the words "with malice aforethought."

No. 2. INDICTMENT FOR MURDER BY SHOOTING

(Code, §§ 4393-4.)

DESCRIPTION:

"in and upon one E. F., then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and the said C. D., a certain pistol, then and there charged with gunpowder and one leaden bullet, which said pistol he, the said C. D. in his right hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, at, against and upon the said E. F., and that the said C. D., with the leaden bullet aforesaid, out of a pistol by the said C. D., discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound the said E. F. in and upon the right side of the head of him, the said E. F., giving to him, the said E. F., then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot off out of the pistol aforesaid by the said C. D., in and upon the right side of the head of him, the said E. F., one mortal wound; of which said mortal wound he, the said E. F., then and there instantly died [or, if the death was not immediate, instead of 'then and there instantly died,' say: 'from the said — day of —, 192—, to the day of —, 192—, in the county aforesaid, did languish, and languishing, did live, on which said — day of —, 192—, the said E. F., in the county aforesaid of the said mortal wound died']. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said C. D., him the said E. F., in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder."

No. 3. INDICTMENT FOR MURDER BY STABBING

(*Idem.*)

DESCRIPTION:

"in and upon one E. F., then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said C. D., with a certain knife in his right hand then and there had and held the said C. D., in and upon the left side of the body of him the

said E. F., then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said E. F., then and there, with the knife aforesaid, in and upon the left side of the body of him the said E. F., one mortal wound; of which said mortal wound, he the said E. F., then and there instantly died (or, if death was not immediate make the change noted within the brackets in No. 4). And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said C. D., him the said E. F., in the manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder."

No. 4. INDICTMENT FOR MURDER BY KICKING AND BEATING

(*Idem.*)

DESCRIPTION:

"in and upon one E. F., then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said C. D. then and there feloniously, wilfully and of his malice aforethought, did strike, beat and kick the said E. F., with his hand and feet, in and upon the head, breast, back, belly, sides, and other parts of the body of him the said E. F., and then and there feloniously, wilfully, and of his malice aforethought, cast and threw the said E. F. down to and upon the ground with great force and violence, giving to the said E. F., then and there, as well by the beating, striking, and kicking of him the said E. F., in manner and form aforesaid, as by the casting and throwing him the said E. F., down as aforesaid, several mortal strokes, wounds, and bruises in and upon the head, breast, back, belly, sides, and other parts of the body of him the said E. F., of which said mortal strokes, wounds, and bruises, he the said E. F., from ——— day of ———, 192—, until the ——— day of ———, 192—, did languish, and languishing, did live; on which said ——— day of ———, 192—, the said E. F., in the county aforesaid, of the several mortal strokes and bruises aforesaid, died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said C. D., the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder."

No. 5. INDICTMENT FOR MURDER OF AN INFANT BY SUFFOCATION

(*Idem.*)

DESCRIPTION:

"being then and there pregnant with a certain female child, did then and there, from the body of her the said C. D., bring forth alive the said female child; and that afterwards, to-wit, on the day and year aforesaid, she the said C. D., in the county aforesaid, in and upon the body of her the said new-born child, then and there being, did make an assault, and that she the said C. D., with both her hands, her the said new-born female child, in a certain piece of flannel, then and there feloniously, wilfully, and of her malice aforethought, did wrap up and

told, by means of which said wrapping and folding the said new-born female child in the piece of flannel aforesaid, she the said new-born female child was then and there suffocated and smothered; of which said suffocation and smothering she the said new-born female child, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said C. D., her the said new-born female child, in the manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder."

No. 6. INDICTMENT FOR MURDER BY POISON

(*Idem.*)

DESCRIPTION:

"feloniously, wilfully, and if this malice aforethought contriving and intending one E. F., with poison, feloniously, wilfully, and of his malice aforethought, to kill and murder, on the ——— day of ———, 192—, in the county aforesaid, feloniously, wilfully, and of his malice aforethought, a great quantity of a deadly poison, called white arsenic, did privately and secretly convey in and leave in the lodging room of the said E. F., in the dwelling-house of him the said E. F., there situate; and that the said C. D., contriving and intending as aforesaid, afterwards, to-wit, on the day and year aforesaid, the same white arsenic, with a certain quantity of coffee, in the same room and house, then and there being, then and there feloniously, wilfully, and of his malice aforethought, did put, mix, and mingle, he the said C. D. then and there well knowing the said white arsenic to be a deadly poison, and also that the said coffee with which the said C. D. did mix and mingle the said arsenic, was then and there prepared for the use of the said E. F., and that the said E. F., afterwards to-wit, on the same day and year aforesaid, did take, drink, and swallow down a great quantity of the said coffee, with which the said white arsenic was mixed and mingled by the said C. D., as aforesaid, he the said E. F., not knowing that there was any white arsenic or other poisonous ingredients mixed or mingled with the said coffee as aforesaid; by means whereof, he the said E. F., then and there became sick and distempered in his body, and the said E. F., of the poison aforesaid, by him so taken, drunk and swallowed down as aforesaid, and of the sickness occasioned thereby, from the said ——— day of ———, 192—, until the ——— day of ———, 192—, in the county aforesaid, did languish, and languishing, did live; on which said ——— day of ———, 192—, in the county aforesaid, he the said E. F., of the poison aforesaid, and of the sickness and distemper occasioned thereby, died. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said C. D., him the said E. F., in the manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did poison, kill, and murder."

No. 7. INDICTMENT FOR MURDER BY STRANGULATION

(Idem.)

DESCRIPTION:

"in and upon one E. F., then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said C. D., a certain rope about the neck of the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did fix, tie, and fasten, and that the said C. D., with the rope aforesaid, him and said E. F. then and there feloniously, wilfully, and of his malice aforethought, did drag, pull, choke, and strangle and his neck did dislocate; of which said dragging, pulling, choking, strangling, and dislocation of the neck, he the said E. F., then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said C. D., him the said E. F., in the manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder."

NAVIGATION

For protection of aids to navigation established by the U. S. Light-house Board, see Code, § 4756.

NEGOTIABLE INSTRUMENTS

See *Assignments; Banks and Banking; Bills of Exchange; Checks; Promissory and Negotiable Notes; Warehouse Receipts.*

- § 1. Definition, requisites, and kinds of negotiable instruments
- § 2. Differences between negotiable and other instruments
 - (1) As to assignability or negotiability
 - (2) As to set-offs, etc.
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- § 3. A "holder in due course"
- § 4. When payable "on demand," "to order," or "to bearer"
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- § 18. Discharge of a negotiable instrument
- § 19. Cancellation of instruments
- § 20. Alteration of instruments
- § 21. Fraudulent use of check, draft, or order
- § 22. Meaning of terms
- § 23. Forms under "Negotiable Instruments"

§ 1. Definition, requisites, and kinds of negotiable instruments.—A negotiable instrument is a writing signed by a person, called the maker or drawer, with an unconditional promise or order to pay a certain sum of money, on demand

or at a fixed or determinable future time, to the order of some one or to bearer, and where the instrument (i. e., the bill of exchange) is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. (Code, § 5563.)

There are three sorts of negotiable instruments covered by the negotiable instruments law: (1) Bills of exchange or drafts—see *Bills of Exchange or Drafts*; (2) negotiable notes—see *Promissory and Negotiable Notes*; and (3) *Checks*, see *Checks*. There are other instruments, not embraced by the negotiable instruments law proper, that are negotiable, viz.: Bills of lading—see *Bills of Lading*; warehouse receipts—see *Warehouse Receipts*; bank drafts and certificates of deposit—see *Banks and Banking* and *Bills of Exchange, or Drafts*; and also registered and coupon bonds of cities or towns or public or private corporations drawn in negotiable form.

It is required:

(1) The sum payable must be a certain sum; though it is not prevented from being certain by being made payable with interest; or in stated instalments, even though with a proviso that upon a default of one instalment or of interest, the whole shall become due; or with exchange, whether at a fixed or the current rate; or with costs of collection or an attorney's fee in case payment is not made when due (Code, § 5564). A provision for a reasonable attorney's fee in case suit is brought, has been held valid (119 Va. 439, overruling 89 Va. 113, and 105 Va. 714).

(2) The promise or order must be unconditional, though an unqualified order or promise is not conditional because coupled with an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount, or a statement of the transaction which gives rise to the instrument; but an order or promise to pay out of a particular fund is not unconditional. (Code, § 5565.)

(3) It must be payable at a fixed or determinable future time, but it is sufficient if it is expressed to be payable at so many days after date or sight, or "on or before" a fixed future time, or on or at a fixed period after the occurrence of a specified event which is certain to happen (as, death), though

the time of happening be uncertain; but an instrument payable upon a contingency (i. e., an uncertain future event, as upon a person arriving at 21) is not negotiable, and the happening of the event does not cure the defect (Code, § 5566).

An instrument containing an order or promise to do any act in addition to the payment of money is not negotiable; but its negotiability is not affected by a provision which authorizes the sale of collateral securities or a confession of judgment in case the instrument is not paid when due; or waives the benefit of any law intended for the advantage or protection of the maker (as, the homestead exemption, or waiver of notice of protest), or gives the holder an election to require something to be done in lieu of payment of money; but this is not to make valid any provision or stipulation otherwise illegal (Code, § 5567).

The validity and negotiability of an instrument are not affected by the fact that it is not dated, or does not specify the value given or that any value has been given therefor, or does not specify the place where drawn or payable, or bears a seal, or designates a particular kind of current money in which payment is to be made; but this shall not alter or repeal any statute requiring the nature of the consideration to be stated. (Code, § 5568.)

§ 2. Difference between negotiable and other instruments.—Negotiable instruments (called “mercantile securities”) are a kind of supplement to money and currency; and differ from promissory notes, bonds, etc., not negotiable (called “common law securities”) in the following essential respects: (1) *As to assignability or negotiability.*—Negotiable instruments payable to order is negotiated (i. e. transferred) by mere endorsement of the holder, and delivery; if payable to bearer, by mere delivery (Code, § 5502), by which the legal title passes. Non-negotiable notes, bonds, etc., do not thus pass the legal title, and when assigned only the equitable title passes, which may now, however, be asserted by the assignee in a court of law (Code, §§ 5144, 5768—see *Assignment*).

(2) *As to set-offs, etc.*—The assignee of a non-negotiable note, bond, or other writing stands in the shoes of the assignor, and must admit all discounts, set-offs, and defenses, which would have been maintainable against the assignor,

down to the time when the debtor had notice of the assignment. (3 Min. Inst., 439-40.)

One taking a negotiable paper before maturity, as a collateral security, is a holder in due course; and he is not affected by a payment made by the maker to the payee, though made in good faith, without knowledge of the assignment by the payee, unless the maker can prove that such payment was made with the knowledge and consent of the holder, or was subsequently ratified by him (117 Va. 1).

"Payable with interest" written in a note in the same handwriting on a blank space after "value received," does not render it incomplete or irregular on its face (105 Va. 51).

Though the note be endorsed to one person, while a third person paid one-half of the consideration and was to receive one-half of the proceeds thereof, the endorsee is the holder in due course (118 Va. 582).

But "a holder in due course" (see next section) of a negotiable instrument holds it free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment for the full amount against all parties liable thereon (Code, § 5618); though in the hands of holder who is not a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable, except a holder who derives his title from a holder in due course and who is not himself a party to any fraud or illegality affecting it, has all the rights of such former holder in respect of all parties prior to the latter (Code, § 5620).

(3) *As to remedies.*—The assignee of a non-negotiable bond, note, etc., cannot sue his assignor until he has exhausted every available resource against the primary debtor; and then only against him alone, and not against him and previous assignors, or against him and the debtor jointly. The assignee of a negotiable paper, on the other hand, may sue the assignor as soon as any default occurs by the primary debtor, and may proceed against all liable therefor, "whether drawer, endorsers or acceptors, or against any intermediate number of them" (Code, § 5760).

§ 3. A "holder in due course."—"A holder in due course" is one who has taken an instrument complete and regular upon

its face, who became the holder before it was overdue and without notice of its previous dishonor, and who took it in good faith and for value, and without notice of any infirmity in it or defect in the title of the person negotiating it (Code, § 5614); but where an instrument payable on demand, other than bank notes or certificates of deposit is negotiated an unreasonable length of time after its issue, the holder is not a holder in due course (§ 5615); and where the one to whom the instrument has been transferred receives notice of any infirmity in it or defect in the title of the one negotiating it before he has paid the full amount agreed to be paid therefor, he is a holder in due course only to the extent of the amount before that time paid by him (§ 5616; see 102 Va. 578); and to constitute such notice, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith (§ 5618). A title is defective where the instrument or any signature thereto was obtained by fraud, duress, or force or fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to fraud (§ 5617).

§ 4. When payable "on demand," "to order," or "to bearer."—An instrument is payable on demand, where expressed to be payable on demand, at sight, or on presentation, or in which no time for payment is expressed; and where issued, accepted, or endorsed when overdue, it is as to the one so issuing, accepting, or endorsing it, payable on demand: it is payable to order where drawn to the order of someone or "to him or his order", and may be to the order of a payee who is not maker, drawer, or drawee, or to the drawer or maker, the drawee, two or more payees jointly, one or more of several payees, or the holder of an office for the time being; and where to order the payee must be named or otherwise indicated therein with reasonable certainty: it is payable to bearer when so expressed, or is payable to a person named therein or bearer, or to the order of a fictitious or non-existing person and such fact was known to the maker, or when the name of the payee does not purport to be the name of any person (as "to cash"), or when the only and last endorsement is in blank, i. e., where no endorsee is named. (Code, §§ 5569-71.)

§ 5. Date.—The expressed date of an instrument, acceptance, or endorsement is *prima facie* the true date. (Code, § 5573.)

An instrument is not invalid because ante-dated or post-dated, if not done for an illegal or fraudulent purpose. The person to whom delivered acquires title as of date of delivery (Code, § 5574.)

When payable at a fixed time after date, and issued undated, or where the acceptance of an instrument payable at a fixed time after sight and undated, any holder may insert the true date. The insertion of a wrong date does not avoid it in the hands of a subsequent holder in due course (see section 3, above), but as to him the inserted date is the true date. (Code, § 5575.)

§ 6. Blanks in complete instruments.—Where the instrument is wanting in any material particular, the holder has a *prima facie* authority to complete it by filling up the blanks. And any signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument, operates as a *prima facie* authority to fill it up as such for any amount. But to make in enforceable against any prior party, it must be filled up strictly in accordance with the authority given and within a reasonable time; if, however, it is negotiated (after completion) to a holder in due course (see section 3, above), it is valid and effectual for all purposes in his hands. (Code, § 5576.) Where an incomplete instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery. (Code, § 5577.)

§ 7. Delivery.—Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties and as regards a remote party other than a holder in due course (see section 3, above), the delivery in order to be effectual must be made either by, or under authority of the party, making, drawing, accepting, or indorsing, and in such case the delivery may be shown to have been conditional or for a special purpose only and not

for the purpose of transferring the property in the instrument. But where in the hands of a holder in due course, a valid delivery by all prior parties so as to make them liable to him, is conclusively presumed. And where no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. (Code, § 5578.)

§ 8. Construction where doubtful.—Where the language is ambiguous or doubtful or there are omissions: (1) Where the sum payable is expressed in words and also in figures, the words have preference, but figures may be referred to if the words are ambiguous or uncertain; (2) where interest is provided but the date from which to run is not expressed, it runs from the date of the instrument, or if it be undated, from the issue thereof; (3) if the instrument is not dated; it is considered dated from its issue; (4) where printed and written provisions conflict, the writing prevails; (5) where it is doubtful whether the instrument is a bill of exchange or a note, the holder may treat it as either; (6) where a signature is so placed upon an instrument that it is not clear in what capacity the person signed, he is to be deemed an indorser (and even an endorsement on the face may be sufficient, 120 Va. 812); (7) where an instrument containing the words "I promise to pay," is signed by two or more persons, they are jointly and severally liable thereon. (Code, § 5579.)

§ 9. Signing in trade name, or as agent, etc.—One signing in a trade or assumed name is liable as if he had signed in his own name. (Code, § 5581.)

Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal or in a representative capacity without disclosing his principal, he is not liable if he was duly authorized, but the mere addition of words describing him as an agent or as filling a representative capacity without disclosing his principal does not exempt him from personal liability. (Code, § 5582.)

§ 10. Endorsement by infant or corporation.—An endorsement or assignment by an infant or a corporation passes the property in the instrument, though he or it may incur no liability thereon. (Code, § 5584.)

§ 11. Forged signature, effect of.—Where a signature is forged or made without authority, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party is precluded from setting up the forgery or want of authority. (Code, § 5585). A fraudulent endorsement of the name of a member of a firm, which was dissolved at the time the note was delivered, of which fact the taker was ignorant, does not bind the member (101 Va. 1.)

§ 12. Consideration.—A negotiable note is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon, to have become a party thereto for value. (Code, § 5586.) Notes secured by a deed of trust are *prima facie* evidence of a valuable consideration (120 Va. 505). Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time. (Code, § 5587.)

One who takes a negotiable note in good faith for value, without notice of any defect, for a pre-existing debt, is a holder for value, (98 Va. 294).

Where value has at any time been given for the instrument, the holder is deemed a holder for value as to all parties who became such prior to that time. (Code, § 5588.)

Where a holder has a lien on the instrument, he is a holder for value to the extent of his lien. (Code, § 5589.)

Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto* (to that extent), whether the failure is an ascertained amount or otherwise. (Code, § 5590; see 124 Va. 518.)

§ 13 Accommodation paper and party.—A promissory note or bill of exchange, made, accepted, or endorsed without any consideration therefor, but merely for the purpose of borrowing money on it, is called an "accommodation paper." In the language of section 5591 of the Code: "an accommodation party is one who has signed the instrument as

maker, drawer, acceptor, or endorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." Thus, A, to accommodate B, makes a note to him, and B, the payee, endorses the note and gets money on it. Or A may have B to make a note to him, and A, the payee, endorses the note for accommodation. The accommodation party has the right to decide for himself what use shall be made of the note which he signs or endorses. He may impose conditions and terms, which will be binding on any person who takes the note with notice thereof. An accommodation paper is not binding as between the parties thereto, there being no consideration, but as between themselves and a third party holding the note, or other parties thereto, it is binding like any other note or bill, except where the note is given under restrictions, as above stated.

§ 14. Negotiation and endorsement.—(1) *In general.*—An instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the endorsement by the holder completed by delivery. (Code, § 5592.)

The endorsement must be on the instrument itself, or upon a paper attached thereto. The signature of the endorser without additional words is sufficient. (Code, § 5593; see 120 Va. 812.)

The endorsement must be of the entire instrument; if it purport to transfer to the endorsee a part only of the amount payable, or if it purport to transfer the instrument to two or more endorsees severally, it is not a negotiation of the instrument; but where it has been paid in part, it may be endorsed as to the residue. (Code, § 5594.)

(2) *Special and blank endorsements.*—An endorsement may be either special or in blank, and either restrictive or qualified or conditional. A special endorsement specifies the person to whom or to whose order the instrument is to be payable, and the endorsement of such endorsee is necessary to

the further negotiation of the instrument. An endorsement in blank specifies no endorsee, and an instrument so endorsed is payable to bearer and may be negotiated by delivery. A holder may convert a blank endorsement into a special by writing over the signature of the endorser in blank any contract consistent with the character of the endorsement. (Code, §§ 5595-7.) A blank endorsement consists in merely signing one's name.

(3) *Restrictive endorsement.*—An endorsement is restrictive which either prohibits the further negotiation of the instrument, or constitutes the endorsee the agent of the endorser, or vests the title in the endorsee in trust for or to the use of some other person; but the mere absence of words implying power to negotiate does not make an endorsement restrictive. A restrictive endorsement confers upon the endorsee the right to receive payment, to bring any action the endorser could bring, and to transfer his rights as such endorsee where the form of the endorsement authorizes him to do so; but all subsequent endorsees acquire only the title of the first endorsee under the restrictive endorsement. (Code, §§ 5598-99.)

(4) *Qualified endorsement.*—A qualified endorsement constitutes the endorser a mere assignor of the title. It may be made by adding to the endorser's signature the words, "without recourse," or any words of similar import. Such an endorsement does not impair the negotiable character of the instrument. (Code, § 5600.)

(5) *Conditional endorsement.*—Where an endorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the endorsee or his transferee whether the condition has been fulfilled or not; but any person to whom an instrument so endorsed is negotiated will hold the same or proceeds thereof subject to the rights of the person endorsing conditionally. (Code, § 5601.)

(6) *Endorsement of instrument payable to bearer.*—Where an instrument payable to bearer is endorsed specially it may nevertheless be further negotiated by delivery; but the person endorsing specially is liable as endorser to only such holders as make title through his endorsement. (Code, § 5602.)

(7) *Endorsement where payable to two or more persons.*—"Where an instrument is payable to the order of two or more payees or endorsees who are not partners, all must endorse unless the one endorsing has authority to endorse for the others." (Code, § 5603.)

(8) *Effect of instrument drawn or endorsed to a person as cashier.*—"Where an instrument is drawn or endorsed to a person as 'cashier' or other fiscal officer, of a bank or corporation it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the endorsement of the bank or corporation or the endorsement of the officer." (Code, § 5604.)

(9) *Endorsement where name is misspelled, etc.*—"Where the name of a payee or endorsee is wrongly designated or misspelled he may endorse the instrument as therein described, adding if he think fit, his proper signature." (Code, § 5605.)

(10) *Endorsement in representative capacity.*—"Where any person is under obligation to endorse in a representative capacity he may endorse in such terms as to negative personal liability." (Code, § 5606.)

(11) *Time of endorsement; presumption.*—"Except where an endorsement bears date after the maturity of the instrument every negotiation is deemed *prima facie* to have been effected before the instrument was overdue." (Code, § 5607.)

(12) *Place of endorsement; presumption.*—"Except where the contrary appears every endorsement is presumed *prima facie* to have been made at the place where the instrument is dated." (Code, § 5608.)

(13) *Continuation of negotiable character.*—"An instrument negotiable in its origin continues to be negotiable until it has been restrictively endorsed or discharged by payment or otherwise." (Code, § 5609.)

(14) *Striking out endorsement.*—"The holder may at any time strike out any endorsement which is not necessary to his title. The endorser whose endorsement is struck out and all endorsers subsequent to him are thereby relieved from liability on the instrument." (Code, § 5610.)

(15) *Transfer without endorsement; effect of.*—"Where the holder of an instrument payable to his order transfers

it for value without endorsing it the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition the right to have the endorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course the negotiation takes effect as of the time when the endorsement is actually made." (Code, § 5611.)

(16) *When prior party may negotiate instrument.*—"Where an instrument is negotiated back to a prior party such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable." (Code, § 5612.)

§ 15. *Liabilities of parties.*— (1) *Liability of maker.*—"The maker of a negotiable instrument by making it engages that he will pay it according to its tenor and admits the existence of the payee and his then capacity to endorse." (Code, § 5622.)

(2) *Liability of drawer.*—"The drawer by drawing the instrument admits the existence of the payee and his then capacity to endorse, and engages that on due presentment the instrument will be accepted or paid or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent endorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder." (Code, § 5623.)

(3) *Liability of acceptor.*—"The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and the existence of the payee and his then capacity to endorse." (Code, § 5624.)

(4) *When person deemed endorser.*—"A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an endorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity." (Code, § 5625; see 119 Va. 439.)

(5) *Liability of irregular endorser.*—"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as endorser in accordance with the following rules: (a) if the instrument is a bill or note payable to the order of a third person, or is an accepted bill payable to the order of the drawer or to bearer, he is liable to the payee and to all subsequent parties; (b) if the instrument is a note or unaccepted bill payable to the order of the maker or drawer or payable to the bearer, he is liable to all parties subsequent to the maker or drawer; (c) if he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee." (Code, § 5626.)

(6) *Warranty; where negotiation by delivery, etc.*—"Every person negotiating an instrument by delivery or by a qualified endorsement warrants that the instrument is genuine and in all respects what it purports to be; that he has good title to it; that all prior parties had capacity to contract, but this does not apply to public or corporate bonds; that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless; but when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee." (Code, § 5627; see 116 Va. 137.)

(7) *Liability of general endorsers.*—"Every endorser who endorses without qualification warrants to all subsequent holders in due course the matters and things mentioned in the first three instances of the next preceding section; and that the instrument is at the time of his endorsement valid and subsisting. And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent endorser who may be compelled to pay it." (Code, § 5628, see 120 Va. 812.)

(8) *Liability of endorser where paper negotiable by delivery.*—"Where a person places his endorsement on an instrument negotiable by delivery he incurs all the liabilities of an endorser." (Code, § 5629; see 115 Va. 441.)

(9) *Order in which endorsers are liable.*—"As respects one another, endorsers are liable *prima facie* in the order in

which they endorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint endorsees who endorse are deemed to endorse jointly and severally." (Code, § 5630.)

(10) *Liability of agent or broker.*—"Where a broker or other agent negotiates an instrument without endorsement he incurs all the liabilities prescribed by section fifty-six hundred and twenty-seven unless he discloses the name of his principal and the fact that he is acting only as agent. (Code, § 5631.)

§ 16. *Presentment for payment.*—See Code, §§ 5632-50.

§ 17. *Notice of dishonor.*—See Code, §§ 5651-80.

§ 18. *Discharge of a negotiable instrument; renunciation.*—"A negotiable instrument is discharged by payment in due course by or on behalf of the principal debtor; by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; by the intentional cancellation thereof by the holder; when the principal debtor becomes the holder of the instrument at or after maturity in his own right." (Code, § 5681.)

"A person secondarily liable on the instrument is discharged by any act which discharges the instrument; by the intentional cancellation of his signature by the holder; by the discharge of a prior party; by a valid tender of payment made by a prior party; by a release of the principal debtor unless the holder's right of recourse against the party secondarily liable is expressly reserved; by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument unless made with assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." (Code, § 5682; see 120 Va. 771.)

"Where the instrument is paid by a party secondarily liable thereon it is not discharged, but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements and again negotiate the instrument, except where it is payable to the order of a third person and has been paid by the drawer; and where it was made or accepted for accommodation and has been paid by the party accommodated." (Code, § 5683.)

"The holder may expressly renounce his rights against

any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing unless the instrument is delivered up to the person primarily liable thereon." (Code, § 5684.)

§ 19. **Cancellation of instruments.**—See *Cancellation of Writings*.

§ 20. **Alteration of instruments.**—See *Alteration of Writings*.

§ 21. **Fraudulent use of check, draft, or order.**—See *Checks*, section 7.

§ 22. **Meaning of terms.**—"Bearer" means the person in possession of a bill of exchange or negotiable note which is payable to bearer; "delivery" means transfer of possession, actual or constructive (presumed in law) from one person to another; "holder" means the payee or endorsee in possession or the bearer; "endorsement" means endorsement completed by delivery; "negotiate" means to transfer, which is by delivery, where payable to bearer, but by endorsement completed by delivery, where payable to order; person "primary" liable is the one who by the terms of the instrument is absolutely required to pay it—all others are secondarily" liable; "reasonable time" or "unreasonable time" is determined by the nature of the instrument, the usage of trade or business (if any) in respect to such instruments, and the facts of the particular case; and where the day or the last day for doing an act falls on Sunday or on a holiday, the act may be done on the next secular or business day. (Code, §§ 5752-5.)

§ 23. **Forms under "Negotiable Instruments."**—

No. 1. CHECK

[See *Checks*, section 10.]

No. 2. NEGOTIABLE NOTE

[See No. 2, under *Promissory and Negotiable Notes*.]

No. 3. NEGOTIABLE NOTE PAYABLE IN INSTALMENTS

[See No. 3, under *Promissory and Negotiable Notes*.]

No. 4. NEGOTIABLE NOTE WITH COLLATERAL SECURITIES
[See No. 4, under *Promissory and Negotiable Notes.*]

No. 5. NEGOTIABLE NOTE WITH AUTHORITY TO CONFESS JUDGMENT
[See No. 5, under *Promissory and Negotiable Notes.*]

No. 6. INLAND BILL OF EXCHANGE
[See No. 1, under *Bills of Exchange.*]

No. 7. FOREIGN BILL OF EXCHANGE
[See No. 2, under *Bills of Exchange.*]

No. 8. FORM OF PROTEST
[See No. 3, under *Bills of Exchange.*]

NEWSPAPERS

See, also, *Libel.*

“For an act to prohibit the printing, stamping or impressing of words, figures, designs, pictures, emblems or advertisements on newspapers after the same shall have been issued for circulation, without first obtaining consent of the publisher so to do; to prohibit the circulation, distribution or sale of a newspaper so printed, stamped or impressed; and to prescribe fines and penalties for the violation hereof,” see Acts 1922, p. —.

NOTARIES PUBLIC

See *Acknowledgements; Affidavits; Depositions; Justice of the Peace*, div. VIII ("Peace and Good Behavior")

- § 1. Appointment, term, bond, removal, etc.
- § 2. Who eligible to office of notary; liability notwithstanding age
- § 3. Powers and duties of a notary
- § 4. When no tax on seal of notary
- § 5. Fees of a notary
- § 6. Various forms for "Notaries"

§ 1. Appointment, term, bond, removal, etc.—The Governor, usually upon the recommendation of some one showing the necessity for the appointment, appoints as many notaries in the cities and counties as he may think proper, to hold office for four years, subject to removal by the Governor; and he may appoint the same person for two or more counties or cities. Notaries in cities, and in counties in which cities or parts thereof are located, may act in each of said localities. He must give bond with surety before the court or clerk, within four months from the date of his commission, in penalty of \$500 or more, with condition for the faithful discharge of the duties of his office. Removal outside his jurisdiction vacates his office. The Secretary of the Commonwealth, when a commission is ordered by the Governor, sends the same to the clerk of the court, to be delivered to the notary upon his giving bond and taking the oath of office. (Code, § 2850.)

§ 2. Who eligible to office of notary; liability notwithstanding age.—Men and women eighteen years of age are eligible and may execute the bond required; and are liable for their acts and omissions in like manner as if they were of full age (Code, § 2851).

§ 3. Powers and duties of a notary.—He may administer oaths of office to members of the General Assembly or a judge of court (Code, § 273).

He may administer oaths and take affidavits generally (Code, §§ 274-5); take and certify acknowledgments of deed or other writing (Code, § 5205), stating therein when his commission expires (Code, § 5210), and if a woman notary marries, stating therein, "I was commissioned notary as —", giving her maiden name (Code, § 5210); take and certify depositions of witnesses (Code, §§ 6225-6); protest negotiable

instruments for non-acceptance or non-payment (Code, §§ 5716, 5680), and attest payment thereof for honor (Code, §§ 5734-5); and attest copies of foreign records (Code, § 6207).

He is also a conservator of the peace and may require bond for peace and good behavior the same as a justice (Code, §§ 4789, etc.).

§ 4. When no tax on seal of notary.—No tax is charged when a seal is annexed by a notary to an affidavit or deposition; nor in pension, militia, or land bounty claims; and in these cases, the notary using a seal should certify that no tax is required, which may be done by adding, "no tax in this case being required by the laws of Virginia upon the seal affixed hereto." (Code, § 2402.) In other cases, there is a tax of \$1, and the seal must be impressed upon an adhesive stamp, which may be purchased of the clerk or treasurer of the county or city for \$1; otherwise the seal will not be accepted as a legal notarial seal, and the notary failing to use the adhesive stamp or making a false certificate that no tax is required, is guilty of a misdemeanor, punishable by a fine of \$20. (Tax Bill, § 16, in Appendix to Va. Code, 1919.) See, also, *Taxation and Tax as, section 29.*

§ 5. Fees of a notary.—By section 3480 of the Code, the fees of a notary are as follows:

- "(1) Where there is a protest by a notary, for the record thereof, making out instrument of protest under his official seal, and notice of dishonor to one person besides the maker of a note or acceptor of a bill \$1 00
- (2) For every additional notice 10
- (3) For taking and certifying the acknowledgement of any deed or other writing 50
- (4) For administering and certifying an oath, unless it be the affidavit of a witness 25
- (5) For taking and certifying affidavits or depositions of witnesses, where done in an hour (a justice now gets \$1.00) 75
- (6) If not done in an hour, for any additional time, at the rate per hour 75
- (7) For other services a notary shall have the same fees as the clerk of a circuit or city court for like services."

By section 3494 a notary is required to keep a fee book.

A notary returning affidavits or depositions, must state at the foot thereof the fees therefor, to whom charged, and if paid by whom (Code, § 3483).

Notaries under 21 years may sue for fees due them (Code, § 2852).

§ 6. Various forms for "Notaries."—

[See under titles *Acknowledgments*, *Affidavits*, *Depositions*, and *Justice of the Peace*, div. VIII. ("Peace and Good Behavior").]

NOTICE

See *Corporations*; *Depositions*; *Negotiable Instruments*; *Motions for Money*; "Unlawful Detainer," under *Justice of the Peace*, div. III., and other particular titles

- § 1. How served on residents
- § 2. Service on non-residents
- § 3. Computation of time of notice given
- § 4. Various forms of "Notice"

§ 1. How served on residents.—By section 6041 of the Code: "A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he or she be not found at his or her usual place of abode, by delivering such copy and giving information of its purport to any person found there, who is a member of his or her family, (not a temporary sojourner, or guest) and above the age of sixteen years; or if neither he nor she, nor any such person be found there, by leaving such copy posted at the front door of said place of abode. Any sheriff, sergeant, or constable thereto required, shall serve a notice in his county or city, and make return of the manner and time of service; for a failure so to do he shall forfeit twenty dollars. Such return, or a similar return by any other person, not a party to or otherwise interested in the subject matter in controversy, who verifies it by affidavit, shall be evidence of the manner and time of service. A notice in writing,

however, which has reached its destination within the time prescribed by law, if any, (as, where sent by mail or otherwise delivered), shall be sufficient, although not served in the manner above mentioned."

For notice served in divorce cases, see sections 6042 and 5108 of the Code, and *Divorce*.

§ 2. Service on non-residents.—By section 6043 of the Code: "Any such notice as is mentioned in the two preceding sections to a person not residing in Virginia may be served by the publication thereof once a week for four successive weeks, in a newspaper published in the city or county where the proceedings, about which the notice is given, are to be held, or if no newspaper is published in such city or county, then in a newspaper published in some convenient city or county."

As to personal service, section 6071 provides: "Personal service of the summons, *scire facias*, or notice, may be made by any person not a party to or otherwise interested in the subject-matter in controversy, on a non-resident defendant out of this State, which service shall have the same effect, and no other, as an order of publication duly executed, or the publication of a copy of process or of notice under this chapter (as to 'Process and Order of Publication'), as the case may be. In such case the return shall be made under oath, and shall show the time and place of such service, and that the defendant so served is a non-resident of this State."

For service on counsel in case of depositions, see *Depositions*, section 2.

§ 3. Computation of time of notice given.—By clause 8, of section 5 of the Code: "Where a statute requires a notice to be given, or any other act to be done, a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion or proceeding, but the day on which such notice is given or such act is done, may be counted as part of the time."

§ 4. Various forms of "Notice."—

No. 1. NOTICE FOR POSSESSION IN CASE OF UNLAWFUL DETAINER

[See Nos. 10-12, under *Justice of the Peace*, div. III (as to "Unlawful Detainer").]

**No. 2. NOTICE OF MOTIONS FOR MONEY ON BOND, NOTE, OR ACCOUNT OR
FOR AN INJURY**

[See No. 1, under *Motions for Money.*]

No. 3. NOTICE OF MOTIONS AGAINST OFFICERS

[See Nos. 1 to 11, under *Sheriffs, Sergeants, Constables, etc.*]

No. 4. RETURN OF SERVICE ON AN INDIVIDUAL

[See Nos. 16 and 17, under *Justice of the Peace*, div. I.]

**No. 5. AFFIDAVIT OF SERVICE ON MEMBER OF FAMILY OR BY POSTING AT
FRONT DOOR**

[See No. 13, under *Justice of the Peace*, div. III.]

No. 6. AFFIDAVIT OF SERVICE ON A NON-RESIDENT

See No. 18, under *Sheriffs, Sergeants, Constables, etc.*

No. 7. RETURN OF SERVICE ON CITY OR TOWN

[See No. 13, under *Justice of the Peace*, div. I.]

No. 8. RETURN OF SERVICE ON CORPORATIONS

[See Nos. 28 and 29, under *Corporations.*]

No. 9. RETURN OF SERVICE ON CARRIAGE (NOT INCORPORATED)

[See No. 19, under *Sheriffs, Sergeants, Constables, etc.*]

NOVATION OF DEBTS

- § 1. Definition
- § 2. Novation as to the debt itself
- § 3. Novation by substitution of a new debtor
- § 4. Novation by substitution of a new creditor
- § 5. Novation by substitution of a new debtor and creditor

§ 1. **Definition.**—Novation is the substitution of a new for an old debt, the latter being extinguished; it is not a mere substitution of a new note or bond, but a new obligation or debt.

§ 2. **Novation as to the debt itself.**—This is where a new note is given by the debtor, and accepted by the creditor, in satisfaction of a pre-existing debt. The new note, bond or other security substituted for the old must be not only intended to be a novation, and designed to extinguish the old debt, but it must be in some particular different from the old, so as possibly at least to be a benefit to the creditor, else the contract of acceptance is void, and the new note, etc., is only an additional security. (3 Min. Inst. 414.)

Where a debt is secured by a lien, extreme caution should be taken in accepting other evidences of a debt in place of that originally executed, lest the novation release the lien by implication of law. Whether a novation is effected or not depends upon the intention of the parties. If the new security is taken in full satisfaction of the old, clearly a novation results. But no mere change in the form of a debt will release the lien, unless so intended. Giving up the original security upon acceptance of the new, is evidence of such intention, but not conclusive. An ordinary renewal of negotiable paper with no change in the parties to it, is generally held not to affect or release the lien securing it. (See 3 Grat. 173; 9 Grat. 485; 33 Grat. 186; 82 Va. 190; 86 Va. 1.)

§ 3. **Novation by substitution of a new debtor.**—Here, also, the original liability must be extinguished. Thus: Where A. owes B., and C. owes A., and C. promises A., with B's concurrence, to pay B., the shifting and cessation of liability mutually constituting the consideration for the arrangement. And C's promise to pay B. is not a promise to pay the debt of another and need not be in writing (Code, § 5561), because A's debt is extinguished, and a new debt is created by

C., the consideration for which is the extinction of his to A. (3 Min. Inst., 414-15.)

§ 4. Novation by substitution of a new creditor.—As, where A. having a claim against B., sells and assigns it to C., and B. promises C. to pay it. Or, where an old firm about to be dissolved assigns the debts due them to the new firm, and the debtors, with knowledge of the assignment, promise to pay the new firm, and are released as to the old. Or, in case of an assignee of a note, bond, etc., to whom the debtor makes a promise to pay, the latter being released as to his former creditor. The mutual assent of the three parties is necessary to make it an effectual novation. (3 Min. Inst. 415.)

§ 5. Novation by substitution of a new debtor and creditor.—As, A. owes B., C. owes A., and B. owes D., and by mutual arrangement, it is agreed that C. shall pay D.; B's debt to D. is thus extinguished, together with C's debt to A and A's debt to B., and this creates a consideration for C's promise to D. Or, where A. sold B. a wagon, which B. afterwards sold to C., and C. promised, with B's concurrence, to pay A. for it, and A. agreed to discharge B. Or, where an order is addressed by a creditor to his debtor to pay the debt to a third person, to whom the creditor himself is indebted, and the order is accepted in satisfaction of the debt due to the third party, and assented to by the debtor. (3 Min. Inst. 415-16.)

NUISANCE

- § 1. Definition and punishment of public nuisance; private nuisance
- § 2. Nuisance offending against religion
- § 3. Public scandal, indecency and immorality
- § 4. Acts tending to break the public peace
- § 5. Offenses affecting the public health
- § 6. Offensive industries and dangerous animals
 - (1) Offensive industries
 - (2) Dangerous animals
- § 7. Obstructing highways and watercourses
- § 8. Nuisances under the "Prohibition Law"

- § 9. Abatement of nuisances, public and private
 - (1) Abatement of public nuisance
 - (2) Abatement of nuisance, public or private, by one's own hands
- § 10. Form of "description" in warrant or indictment

§ 1. Definition and punishment of public nuisance; private nuisance.—A public or common nuisance is a common law misdemeanor, punished, under statute (Code, § 1520), by a fine not exceeding \$5,000, and is defined to be any act or omission that worketh hurt, inconvenience, damage, or annoyance to the public in general, and not merely to some particular person, and no length of continuance can legalize it. The offending qualities of a nuisance are, in general, smell, noise, danger, indecency and obstruction.

A private nuisance, which is an injury to a particular person, is not indictable, but actionable only, and is defined to be anything done to the hurt or annoyance of the lands, tenants, or hereditaments of another—e. g., erecting a house so as to throw the rain-water, falling on it, on a neighbor's land, or so near another's house as to obstruct such neighbor's ancient lights; keeping hogs or other animals so as to incommode a neighbor and render the air unwholesome; polluting a neighbor's stream of water; obstructing one's private right of way across another's grounds; and other like instances. (H's G. & M., p. 362.)

§ 2. Nuisance offending against religion.—Any public act that grossly and wantonly shocks the religious sense of the community as a body, is a public nuisance—e. g., disturbing public rest on Sunday by unnecessary conspicuous and noisy conduct; continuous gross and scandalous profanity in the hearing of divers persons; publicly blaspheming or reviling the Christian religion; and such like offenses against religion. (H's G. & M., pp. 352-3.)

§ 3. Public scandal, indecency and immorality.—Whatever is productive of public scandal or indecency, shocking to humanity, or *contra bonos mores*, is likewise a public nuisance—e. g., habitual use of indecent language in the presence of passers-by and at the public generally, or habitual public scolding, or being a "common scold"; constant noisy public brawling and quarrelling, or being a "common brawler"; fomenting vexatious and groundless litigation among citizens,

i. e., being a "common barrator"; habitual eaves-dropping or listening under walls or windows or the eaves of a house, to hearken after discourse, and therefrom to frame slanderous and mischievous tales; giving false alarms or intelligence to the disturbance of the community; keeping a disorderly house; public cock-fighting or other scandalous and disorderly gaming; common drunkenness; casting a dead body into a river without burial; selling or buying a wife; bathing near dwellings, highways, or frequent resorts; roaming the streets or in public places in a state of nakedness, or exposing one's private parts to the public view; openly and notoriously haunting houses of ill fame; parading stud horses through a city or letting them to mares in public; exhibiting in public an unnatural and monstrous birth, or offensive and disgusting pictures, or anything scandalous or indecent. (H's G. & M., p. 353.)

As to houses of prostitution, etc., and furniture, etc., therein, as nuisances, see Code, § 1521; and Acts 1918, p. 441. See also *Criminal Law and Procedure*.

§ 4. Acts tending to break the public peace.—Whatever tends to a breach of the public peace is also a public nuisance—e. g., drawing a number of persons together, to the disturbance of the neighborhood; driving a carriage incautiously through a crowded street; disturbing a religious congregation; violently interrupting any public meeting; going about armed with dangerous and unusual weapons, to the terror of the citizens; to tear down forcibly and contemptuously an advertisement; to break into a house and disturb its occupants; and, in short, to do any act the natural consequence of which is a disturbance of the public peace. (H's G. & M. pp. 353-4.)

§ 5. Offenses affecting the public health.—Any act or omission, which in the regular course of events is likely to generate disease or communicate infection, is a public nuisance—e. g., allowing noxious waters or other filth to pass from the defendant's lands to the lands of neighbors; obstructing or damming a stream so as to endanger the public health; knowingly and wilfully exposing for sale, or having in his possession with intent to sell for human food, articles which he knows to be unfit therefor, exposing to the public a human

being or a brute animal having a contagious disease; or, in general; doing or omitting to do any thing whereby the public health is endangered. (H's G. & M., p. 354.) See *Health*.

For enforcement of health regulations in a city or town, see Code, §§ 1518-19.

§ 6. Offensive industries and dangerous animals.—

(1) *Offensive industries*.—It is not essential in order to constitute an industry a public nuisance that it should be detrimental to public health. It is sufficient if it be offensive to the sense of smell or of hearing, so far as concerns the public at large; or if it in any way produces general physical discomfort or impairs the enjoyment of life and property among the neighbors. No prescription, collateral benefit, nor good intent, is a defense. And when population moves up to a nuisance previously in solitude, as general rule the nuisance must recede; but where the industry is originally planted in an uninhabited district, not within the corporate limits of a city, or town, or village, then whether the industry must recede is a question of expediency. The following industries have been held public nuisances: A swine-yard or even a pig-stay in a city; a tannery in a city, a petroleum manufactory in a city; slaughter-houses in a city or in a closely settled neighborhood; tallow chandlery in a closely populated neighborhood; storage of gunpowder and other explosive compounds in such a way as to imperil or even terrify the community; noxious vapors affecting the air of a populous neighborhood; continuous smoke, producing discomfort in the neighborhood; offensive continuous manufacture of manures and fertilizers; dairies in a city when they emit noxious and offensive exhalations and odors, to the annoyance of the neighborhood. But stables, when not conducted with such negligence as to prejudice public health, even though the value of the property in the immediate vicinity may be depreciated and immediate neighbors may be annoyed by the kicking and stamping of the horses, is not a public nuisance; though it is otherwise as to stables conducted with unnecessary offensiveness. Nor are brick-kilns, unless managed in such a way as to be specially offensive; otherwise as to burning bricks in a populous place so as to

offend and annoy the neighbors. Nor are gas works public nuisances, when essential to a city and conducted with proper care.

(2) *Dangerous animals*.—It is also a public nuisance to suffer a dangerous animal to go at large—e. g., a vicious dog; a savage bull, or other mischievous or ferocious animal. (H's G. & M., pp. 354-5.) See, also, *Animals*, etc.

§ 7. **Obstructing highways and watercourses**.—To obstruct in any manner, wholly or partially, a road over which the public has a right of way is a public nuisance—e. g., making a fence or gate, or digging a ditch across or encroaching on it; laying timber or other material in it; allowing wagons to stand in it an unreasonable time; permitting the adjacent ditches to become foul, or boughs of trees to project over it; blasting in such away as to disturb and imperil passers-by; mill-owner opening a ditch or sluice across a public road for the flow of his waters; placing on or near the highway objects likely to frighten horses; wantonly and violently running a horse up and down a highway; unlicensed or excessive obstruction by a railroad; collecting in a highway, by the use of violent, indecent, and excited language, or by any public show or game, a crowd by which the passage is blockaded or checked; and, in short, anything that prevents the public from having free use of a highway by unreasonably blocking it, or otherwise temporarily excluding them from it, or putting on it permanent structures, or placing in its vicinity instruments which make its public use insecure or uncomfortable. (H's G. & M., p. 355.)

Occupying or using streets, avenues, parks, bridges, or other public place or property, or an easement, in a city or town, contrary to law, is a nuisance—Code, § 3024.

For obstructing highways and bridges, see Code, §§ 4730-57, and title *Criminal Law and Procedure*.

It is likewise a public nuisance to pollute the waters of a stream used to supply drinking water to a community entitled to use it in this way, or to obstruct the passage of rivers navigable for vessels employed in commerce by bridges or otherwise so as to diminish appreciably its capabilities for navigation, or to divert a part of such stream whereby the current of it is weakened. It is also a public nuisance to

obstruct the free passage of fish, whether in public or in private rivers.

For the pollution of drinking water, see Code, §§ 1783-96; Acts 1918, p. 425; and title *Criminal Law and Procedure*.

For obstructing navigation or passage of fish in certain rivers and counties of the State, see Code, §§ 3577, 4747-54; 106 Va. 482.

§ 8. Nuisances under the "Prohibition Laws."—By section 4622 of the Code: "All houses, boat houses, buildings, tents, club, fraternity and lodge rooms, boats, cars and places of every description, including drug stores, where ardent spirits are manufactured, stored, sold, vended, dispensed, bartered, given away, furnished or used contrary to law, by any scheme or device whatever, shall be held, taken and deemed common nuisances.

"Any person who shall maintain, or shall aid or abet, or knowingly be associated with others in maintaining such common nuisances, shall be guilty of a misdemeanor and judgment shall be given that such house, building, tent, boat house, boat, car or other place, or any room or part thereof, be closed up, but the court may, upon the owner giving bond in the penalty of not less than \$500, and with security to be approved by the court, conditioned that the premises shall not be used for unlawful purposes, or in violation of the provisions of this chapter (as to 'Intoxicating Liquors'), turn the same over to the owner."

An injunction may also be had against such nuisances—Code, § 4630.

§ 9. Abatement of nuisances, public and private.—

(1) *Abatement of public nuisance.*—This is on complaint to court by five or more citizens and presentment of a special grand jury; and if upon trial the offender is found guilty, he is fined not over \$5,000, and the nuisance is also ordered to be removed and abated. A judgment against the property is enforced as an attachment levied on real estate—see *Justice of the Peace*, div. II. ("Attachments"). (Code, § 1520; 106 Va. 482.)

Moreover, a court of equity will generally intervene by way of injunction to restrain the commission or continuance of nuisances, whether public or private; for they are for the

most part liable to produce irremediable injury, for which damages or punishment is an insufficient atonement, and the injury must, therefore, be prevented. For the procedure, see Code, §§ 1522-8.

(2) *Abatement of nuisances, public or private, by one's own hands.*—All nuisances, public or private, may be abated or removed—public nuisances, by any one of the community, in cases where serious damage would result if the appeal for abatement be to the law; and private nuisances, by him only who is aggrieved thereby; and in no case must the abatement cause a breach of the peace or a riot, unless, possibly, the continuance of the evil be more disturbing to the community than such breach of the peace. Thus a dog, when habitually ranging the highways or marauding in fields, so as to imperil life or property, or when disturbing a neighbor by incessant and distressing noise, may be killed, but a single annoyance is not enough, on the ground given by Lord Cockburn, that “every dog is entitled to at least one worry.”

Of nuisances of commission, the perpetrator is taken to be aware, and they may, therefore, be abated without notice to him; but in case of a nuisance of omission it is otherwise, and there must be notice to the wrong-doer, saving only in the case of branches of trees overhanging a highway or one's private grounds, which, being an unequivocal act of negligence, constitutes a special exception, and they may be cut without notice. The abatement must be confined rigorously to the annoyance itself, and no wanton or unnecessary injury will be excused. The reason the law allows this summary method of doing one's self justice is because injuries of this kind are such as require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice. (H's G. & M., pp. 357-8.)

§ 10. Form of “description” in warrant or indictment.—

NO. 1. WARRANT OF ARREST FOR A NUISANCE GENERALLY

(*Idem.*)

DESCRIPTION:

“as well as on divers other days and times, before and afterwards, unlawfully and injuriously did [here state the acts or omissions which constitute the nuisance], to the great damage and common nuisance of divers people of this Commonwealth.”

OATHS AND BONDS

See *Affidavits; Officers (County, City, and District)*

§ 1. **Oaths of office.**—For the oaths, see Code §§ 269-7; who may administer, § 273; where fact recorded, § 277.

§ 2. **Bonds taken by courts and officers.**—See Code, §§ 279-88.

OBSCENE BOOKS, PICTURES, AND PRINTS

§ 1. **Publishing, selling, distributing, etc., obscene books, etc; how punished.**—"If any person import, print, publish, sell, or distribute any book or other thing containing obscene language, or any print, picture, motion picture film, figure, or description, manifestly tending to corrupt the morals of youth; or introduce into any family or place of education, or buy, or have in his possession, any such thing for the purpose of sale, exhibition, or circulation, or with intent to introduce it into any family or place of education, he shall be guilty of a misdemeanor", punishable by a fine not over \$500, or jail not over 12 months, or both. (Code, § 4549, as amended by Acts 1920, p. 340, and § 4782.)

§ 2. **Search warrant for.**—See *Search Warrants*.

§ 3. **Form of "description" in warrant or indictment.**—

No. 1. SELLING OBSCENE BOOKS, PRINTS, OR PICTURES

(Code, § 4549, as amended by Acts 1920, p. 340.)

DESCRIPTION:

"did unlawfully sell and distribute a certain book, entitled ———, containing obscene language [or, a certain obscene and indecent print or picture, motion picture film, representing—state what], manifestly tending to corrupt the morals of youth."

OBSTRUCTION OF JUSTICE

See *Bribery; Compounding or Concealing Crimes; Escape, Rescue, and Breach of Prison; Jurors (Offenses Concerning); Lobbying; Officers (Disobedience by or of)*

§ 1. Obstructing justice by threats or force; how punished.—By section 4525 of the Code: "If any person, by threats, or force, attempt to intimidate or impede a judge, justice, juror, witness, or an officer of a court, or any sergeant, constable, or other peace officer or any revenue officer, in the discharge of his duty, or to obstruct or impede the administration of justice in any court, he shall be deemed to be guilty of a misdemeanor," which is punishable by a fine not over \$500, or jail not over 12 months or both (Code § 4782).

§ 2. Contempts of court.—See *Contempts*.

§ 3. Form of "description" in warrant or indictment.—

No. 1. RESISTANCE TO A CONSTABLE IN MAKING ARREST

(Code, § 4525.)

DESCRIPTION:

"did by threats and force attempt to intimidate and impede C. R., a constable of said county, in the discharge of his duty in arresting him the said C. D., he the said C. R., constable as aforesaid, being required to arrest the said C. D. by a lawful warrant of arrest directed to him commanding him so to do."

OFFICE (DISABILITIES TO HOLD)

For disability on account of duelling, see Code, § 289; holding office under United States, § 290, and § 291, as amended by Acts 1920, p. 81; sentence for felony, § 292; validity of acts done under color of office, and contracts in violation of this chapter, void, § 293.

For what officers not to hold more than one office, see Code, §§ 2702, 3093. Persons convicted of perjury or accepting a bribe are disqualified to hold office or serve as juror—§ 4495, and § 4497, as amended by Acts 1920, p. 486.

OFFICE JUDGMENTS

See Code, §§ 6134-5; 4 Min. Inst. 720 & seq.; Burks' Pl. & Pr., § 185.

OFFICERS (COUNTY, CITY, AND DISTRICT)

For when and how they qualify, when office deemed vacant, bonds, appointment and removal of deputies, incompatible offices, where to reside, removal from office, forbidden contracts or claims, etc., see Code, §§ 2696-2709, and Acts 1918, p. 506, amending § 2705; Acts 1920, p. 281, amending § 2702; and Acts 1922, amending §§ 2698-9.

For act authorizing the auditing the accounts of city, county, and State officials, see Acts 1922, p. —.

OFFICERS (DISOBEDIENCE BY OR OF)

§ 1. Refusing, delaying, etc., to execute criminal process.—"If any officer wilfully and corruptly refuse to execute any lawful process, requiring him to apprehend or confine a person convicted of, or charged with, an offense, or wilfully and corruptly omit or delay to execute such process, whereby such person shall escape and go at large, such officer shall be confined in jail not exceeding six months, and be fined not exceeding \$500." (Code, § 4510.)

§ 2. Refusal to aid officer in execution of his office.—"If any person, on being required by any sheriff or other officer, refuse or neglect to assist him in the execution of his office in a criminal case, or in the preservation of the peace, or the apprehending or securing of any person for a breach of the peace, or in any case of escape or rescue, he shall be confined in jail not exceeding six months, and be fined not exceeding \$100." (Code, § 4511.)

§ 3. Failure to obey order of justice, etc., on view of breach of the peace, etc.; ignorance of his office, no excuse.—
If any person, being required by a justice or other conservator of the peace, on view of a breach of the peace or other offense, to bring before him the offender, refuse or neglect to obey the justice or other conservator of the peace, he shall be punished as is provided in the preceding section for refusing to assist a sheriff; and if the justice or other conservator of the peace declare himself or be known to be such to the person so refusing or neglecting, ignorance of his office shall not be pleaded as an excuse. (Code, § 4512.)

Disobedience, as embraced by the foregoing sections, was a misdemeanor at common law; for it has always been the duty of citizens to aid officers in the discharge of their duties, wherever assistance is necessary. (H's G. & M., p. 247.)

§ 4. Form of "description" in warrant or indictment.—

No. 1. OFFICER REFUSING OR DELAYING TO ARREST A PERSON
(Code, § 4510.)

DESCRIPTION:

"then being a constable (or *the sheriff*) for said county, did unlawfully, wilfully, and corruptly refuse (or *omit and delay*) to execute a lawful warrant requiring him to apprehend and arrest one E. F., who was charged with [here describe briefly the offense], whereby the said E. F. did escape and go at large."

No. 2. REFUSING OR NEGLECTING TO AID AN OFFICER IN ARRESTING A PERSON
(Code, § 4511.)

DESCRIPTION:

"although he was required by J. H., a constable (or *the sheriff*), in apprehending and arresting one E. F., then charged with [here describe briefly the offense], did then and there unlawfully refuse and neglect so to do."

No. 3. DISOBEYING ORDER OF A JUSTICE IN CERTAIN CASES
(Code, § 4511.)

DESCRIPTION:

"although he was required by J. R., a justice for said county, on view of a breach of the peace by one E. F., to arrest and bring the said E. F. before him the said J. R., did then and there unlawfully refuse and neglect to obey the said order of J. T., justice as aforesaid."

ORCHARDS, ETC. (PROTECTION AGAINST DISEASE)

It is unlawful for any person to own, keep, or sell any peach, almond, apricot, or nectarine tree (a variety of the peach) known to be infected with the "yellows"; and provision is made for the appointment by the circuit judge, on application of ten reputable freeholders, of inspectors of orchards within the limits prescribed by the judge, and the inspector upon finding any trees of fruit thus infected, causes them to be destroyed, with the right of appeal to two assistant inspectors to be appointed by the judge, who acts with the inspector. The inspector of the state is the Commissioner of Agriculture, who furnishes blanks and instructions to the county inspectors. (Code, §§ 894-905.)

The board of control of the Virginia Agricultural Experiment Station is created a State Board of Crop Pest Commissioners, who appoints an entomologist and pathologist (one skilled in the science and causes of disease from insects) called State Entomologist, with necessary assistants. The commissioners compile and send out lists of dangerously injurious insect pests and diseases of plants that may be controlled or eradicated, with particular specifications as to nature and appearance and manner of dissemination of the pests; provide rules and regulations for the State Entomologist, quarantine rules and regulations as to the sale and transportation of nursery stock, within or from without the State; provide for the annual inspection of nursery stock, and the issue to the owners of certificates of freedom from insect pests and plant diseases. The State Entomologist, assistant, or local inspector determines the nature and treatment (at the owner's expense) of plants, and reports same to owner, who may appeal to the commissioners; and the owner may be compelled by the court to give the prescribed treatment. It is unlawful to sell or give away nursery stock without the proper certificate attached; and the dealer shall also get every year a certificate of registration from the Auditor of Public Accounts, countersigned by the State Entomologist, which costs \$20.00.

Upon application of ten freeholders of any city, county, or magisterial district, the State Entomologist or an assist-

ant goes into the locality to see if any tree or plants have San Jose Scale; and if so, a local inspector is appointed to make a full inspection, and he reports to the owner's city council, who fixes the inspector's pay and allows the same upon account filed. (Code, §§ 870-84.)

For protection against "orange" or "cedar rust," of the red cedar trees, see Code, §§ 885-93, and Acts 1922, amending § 892.

ORDER OF PUBLICATION

An order of publication is an order issued by the court or clerk, directing notice of a suit to be published in a newspaper and posted at the front door of the courthouse. It is issued upon proper affidavit of non-residence, or due diligence to find the defendant, without effect, or that process has been twice sent to the county or corporation of his residence more than 10 days before the return day and returned not executed, or that the names of persons interested in the subject to be divided or disposed of in a suit in equity, are unknown, or where process has been executed upon more than 30 persons, who represent like interest as others not served with process. The affidavit must state the defendant's last known post-office address, or if unknown that fact must be stated. (Code, § 3230.) Where in a divorce case the defendant is under sentence to the penitentiary, there is no longer an order of publication against him, but service of the process on the superintendent (Code, § 6042.)

For when clerk of Court of Appeals to issue order of publication, etc., see Code, § 6073.

For what the order of publication to state and require, how published and posted, and when publication in a newspaper dispensed with, see Code, § 6070: within what time after publication case tried or heard, no other publication required unless ordered by court; when notice and of what to be given to counsel; personal service of process, etc., on non-residents, effect thereof, and return to be made—§ 6071; within what time case reheard, and any injustice corrected—§ 6072. See, also, *Notice and Process*, and particular titles.

"OUSTER LAW"

See *Intoxicating Liquors*, section 73

- § 1. Removal of officers from office; proceedings therefor
- § 2. Who to represent Commonwealth under preceding section; trial by jury

§ 1. Removal of officer from office; proceedings therefor.—By section 2705 of the Code: "The circuit courts of counties, and the corporation courts of cities, shall have power to remove from office all State, county, city, town and district officers elected or appointed, except such officers as are by the Constitution removable only and exclusively by methods other than those provided by this and the following section, for malfeasance, misfeasance, incompetency, gross neglect of official duty, or who shall knowingly or wilfully neglect to perform any duty enjoined upon such officer by any law of this State, or who shall in any public place be in a state of intoxication produced by ardent spirits voluntarily taken, or who shall have been convicted of engaging in any form of gambling, or of any act constituting a violation of any penal statute involving moral turpitude. The power to remove the clerk of a court shall be vested only in the court of which he is clerk.

"All proceedings under this section shall be by order of the court on its own motion, or on motion in open court, or upon complaint in writing, filed in the circuit court of the county or corporation court of the city in which the officer proceeded against resides and holds office, which complaint shall state, with a reasonable accuracy and detail, the grounds or reasons for the removal of the officer of whom complaint is made, and shall be sworn to by the person, or by some officer of the organization or corporation making it. As soon as the order is entered by the court on its own motion, or on motion made in open court, or the complaint is filed, the court shall forthwith cause a rule to be issued, requiring the officer complained of to show cause, if he can, why he should not be removed from office, the rule alleging in general terms the cause or causes for such removal. The rule shall be returnable in not less than five nor more than ten days, and shall be served upon the officer with a copy of the complaint

when the proceeding is founded on a complaint, but when the proceeding is founded upon an order of the court of its own motion, or upon a motion made in open court, with a copy of such order. Upon return of said rule duly executed, unless good cause shall be shown for a continuance, or postponement to a later day in the term, the case shall be tried on the day named in said rule taking precedence over all other cases on the docket, and if upon such trial it shall appear that the officer has violated any of the provisions of this section, or has failed in the performance of his duty as required herein, he shall be removed from office. Nothing in this section shall be construed to interfere with any power vested in the mayor of any city by section 120 of the Constitution of the State, or to repeal any provision of the charter of any city or town, or any ordinance in pursuance of such charter, for the removal of any of the officers of said city or town."

§ 2. Who to represent Commonwealth under preceding section; trial by jury.—By section 2706 of the Code: "In any trial under the preceding section the attorney for the Commonwealth shall represent the Commonwealth. In prosecutions arising under chapter 184 and all other prohibition laws pertaining to ardent spirits as therein defined, the Commissioner of Prohibition, if an attorney at law, or some attorney representing his office, shall, with the attorney for the Commonwealth, represent the Commonwealth, and said commissioner shall have the right to employ other counsel to be associated with them. No complaint arising under chapter 184 shall be dismissed without the consent of the Commonwealth's attorney and the Commissioner of Prohibition, or the attorney representing him. If the proceeding is against the attorney for the Commonwealth for violating any of the provisions of the preceding section then the court shall appoint some attorney to represent the Commonwealth, except in cases arising under chapter 184, when the Commissioner of Prohibition shall have the right to select an associate with the attorney so appointed by the court. Any such officer proceeded against for violating the provisions of the preceding section shall have the right to demand a trial by jury, except in cases where the officer is an appointee, in which case it shall be triable by the court without a jury. The Com-

monwealth and the defendant shall both have the right to apply to the Supreme Court of Appeals for a writ of error and supersedeas upon the record made in the trial court, and the Court of Appeals shall hear and determine such cases."

OVERSEERS AND SUPERINTENDENT OF THE POOR

- § 1. Election, term, qualification, and bond and pay of overseers; superintendent of the poor
- § 2. Duties of superintendent of the poor
- § 3. Powers and duties of an overseer

§ 1. Election, term, qualification, bond, and pay of overseers; superintendent of the poor.—In each magisterial district is elected one overseer of the poor, on Tuesday after the first Monday in November, in every fourth year after 1919, to serve four years; and he qualifies before the court, judge, or clerk, by taking the oaths prescribed by law, and giving bond in penalty not less than \$500 and not less than double the amount that will actually pass through his hands. (Code, §§ 127, 2696-8.) An overseer gets \$2 per day while actually engaged, not exceeding \$20 a year, to be paid out of the county levy (Code, § 2806).

A superintendent of the poor for the county poorhouse is appointed, upon recommendation of the board of supervisors, by the court or judge, in November, every fourth year after 1919, for four years; and he qualifies before the court, judge, or clerk by taking the oaths prescribed by law, and giving bond in penalty from \$1,000 to \$4,000. (Code, §§ 126, 2696-8.) His salary is fixed by the board of supervisors, according to population of county, not less than \$240 nor more than \$400 (Code, § 2799).

§ 2. Duties of superintendent of the poor.—He has charge of the county poorhouse, or when there is none, provides suitable accommodations, under the directions of the board of supervisors, making reports annually or oftener, if required, of expenditures, and of whatever relates to the

business of maintaining the poor. (Code, §§ 2794, 2798.) He may sue and be sued (Code, § 2797).

While it is the business of the superintendent to take charge of and provide for all paupers committed to him at the place of general reception by the individual overseers, or otherwise, according to law, the expense is provided for, according to an estimate submitted by the superintendent, by the board of supervisors, which also provides necessary buildings and a suitable farm as a place of general reception for the poor of the county (Code, §§ 2794-5, 2798).

The supervisors also may appoint a physician and nurse to attend the poor at the poorhouse and allow a reasonable compensation therefor (Code, § 2796).

§ 3. Powers and duties of an overseer.—He sends to the poorhouse those paupers of his district who have legal settlement in his county, sends paupers to their proper place of settlement, or out of the State, and prevents begging in his district. The poor within the law, or pauper, is one unable to maintain himself, and his family, if it is unable to maintain itself. A person has a legal settlement in a county if he has resided therein one year; provided he has not (being then a pauper) migrated into the State within three years. Application for relief is made to the district overseer where the pauper resides, or if there be no overseer there, then to one in another district. If relief is wrongfully refused, the court may direct assistance to be furnished. Generally the pauper is sent to the poorhouse, and if able to work is made to do so. But a district overseer, when ordered by the board of supervisors, may give assistance to paupers at their homes, the expenses thereof to be certified by the overseer to the board. The board provides an annual emergency contingent fund for each district, not exceeding \$50. (Code, §§ 2800-2805.)

An overseer may, by a previous order of the court, place in an incorporated institution for destitute children, or may bind as an apprentice, any minor who has or is likely to become chargeable to the county or city (Code, § 5299).

OYSTERS AND OTHER SHELL FISH

See Licenses and License Taxes

§ 1. **Commission of fisheries.**—See *Fishing and Fisheries*, section 1.

§ 2. **Oysters and other shell fish in general**—See Code, §§ 3219-98, and Acts 1920, pp. 834, 828, amending §§ 3254, 3293, respectively; and Acts 1922, amending §§ 3240, 3246, 3257, 3292, 3299 (4).

§ 3. **Potomac river statutes.**—See Code, §§ 3299—3305.

§ 4. **Procedure for enforcing forfeitures, under fish, oyster, and game laws.**—See Code, §§ 3366-77.

PAINTS, TURPENTINE AND LINSEED OIL

For “an act to prevent deception in the sale of paint, turpentine, linseed oil and any substitute therefor; to provide for true labels for the same; and providing for enforcement thereof; and providing penalty for the violation thereof,” see Acts 1922, p. —.

PARDON

§ 1. **Power of Governor to pardon; commutation of capital punishment.**—By section 5069 of the Code: “The Governor shall not grant a pardon in any case before conviction. In any case in which he shall exercise the power conferred on him by the Constitution (§ 73) to commute capital punishment, he may issue his order to the Superintendent of the Penitentiary, requiring him to receive and confine (and the superintendent shall receive and confine) in the penitentiary, according to such order, the person whose punishment is commuted. To carry into effect any commutation of punishment, the Governor may issue his warrant

directed to any proper officer; and the same shall be obeyed and executed."

"Any officer, to whom any order or warrant of the Governor is directed, shall make return thereof to the Secretary of the Commonwealth, who shall preserve the same in his office." (Code, § 5070.)

By section 73 of the Constitution, the Governor has power (except when the prosecution was by the House of Delegates), "to grant reprieves and pardons after conviction; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution, and to commute capital punishment;" but he must report biennially to the General Assembly the particulars of each case and his reasons for the pardon, etc.

§ 2. Remission of fines.—Section 73 of the Constitution also gives the Governor "power to remit fines and penalties in such cases, and under such rules and regulations as may be prescribed by law"; for which see *Fines*, section 3.

PARENT AND CHILD

See Guardian and Ward; Minor, Infants, or Children

- § 1. What children are legitimate
- § 2. Duty of father to support his children; when child to support parent
- § 3. Custody of children
- § 4. Correction of children by parents
- § 5. When parent entitled to child's services and wages
- § 6. Consent of parent to child's marriage
- § 7. Parent has no control over minor's estate

§ 1. What children are legitimate.—A legitimate child in Virginia is one born in wedlock (provided procreation by the husband was not impossible), and this is true even though the marriage may afterwards be declared void from the beginning (except in case of marriage of white and colored persons); or one born within a competent time after the marriage is ended; or one born before marriage, if the parents

afterwards intermarry and the father recognizes the child as his either before or after the marriage. (Code, §§ 5269-70.)

§ 2. Duty of father to support his children; when child to support parent.—By the common law of Virginia the father is legally bound to supply necessities to his infant child; and for non-support he may be proceeded against criminally the same as for non-support for his wife.

By an extensive statute (§ 1909) it is now provided that either parent or both may, in term or in vacation, be proceeded against civilly by rule to show cause why he may not be compelled to support the child, and if found able to do so, or to contribute thereto, the court will direct weekly or monthly payments for one year to the custodian of the child, and may require recognizance for appearance at court whenever ordered within the year, and for compliance with the orders of the court. See *Desertion or Non-Support*.

The child may bind the father for necessities, on the score of duty as well as on the score of agency,—like in the case of the wife—see title *Marriage*, sections 4 and 7. This duty of support prevails even though the child has property of his own; but if the father is not able to support and educate him in a manner corresponding to the fortune he is to enjoy, a court of equity will decree such a sum to be contributed periodically from the child's estate as will suffice to accomplish the purpose in view; and allowance may also be made for back maintenance, but without interest. (1 Minor, 408-9.)

Where a child is entitled to a fund under the control of a court (though no suit be pending) of less than \$500, the court may decree it to be turned over to the child, if of sufficient age and discretion, to use it judiciously; otherwise to one of the parents for the education, maintenance and support of the child, but if no parent be living capable of handling the fund, the court will cause the fund to be applied to the "maintenance and support" ("education" not mentioned) of the child. (Code, § 5344.)

By statute, a child 16 or over and able, is bound (under penalty of a fine not over \$500 or jail not over 12 months, or both) to support his mother or aged or infirm father, he or she being in destitute or necessitous circumstances. (Acts 1922, p. —.)

§ 3. Custody of children.—The father has, against all other persons, the right to the custody of his child under 21 years, and on his death or disability (or in case of an illegitimate child) the mother (even though married again) is entitled thereto; and he or she has the right even as against the guardian appointed by the father's will, or by the court of chancery, at least (as to such guardian but not as to another person) until she (in the case of the mother) marries again. Section 5320 of the Code, provides that where another guardian is appointed by the court or the father's will, for a minor and his estate, "the father of the minor if living, and in case of his death, the mother, while she remains unmarried, shall, if fit for the trust, be entitled to the custody of the person of the minor, and to the care of his education"; and the Revisors of the Code of 1919 add this sentence of general application taken from Act 1916: "If either the father or the mother of an unmarried infant (i. e., a minor) be dead or unable or refuse to take its custody, or has abandoned his or her family, the other shall be entitled to the custody, services, and earnings of such infant."

But while the father *prima facie* is entitled to the custody of his child, the court (at common law and by statute—Code, §§ 5107, 5111, 5326) has authority to give the custody to the mother or another, where it will be for the best interests of the child, which is the polar star in deciding its custody in all cases. The husband has been deprived of this custody on account of its tender age (as, seven months or even older) or physical infirmity, or some gross moral delinquency on the father's part, as cruelty to the child, habitual drunkenness, blasphemy, profligacy, or other immorality, showing him to be clearly unfit for so important a function. (1 Minor, 427-9.)

In divorce cases, the innocent party on whose prayer a divorce is granted, is usually entitled to the custody of the children. (22 Grat. 16; 83 Va. 816; 95 Va. 701; 96 Va. 1192).

A parent may transfer to another the custody of his child, and the court will sustain the agreement if it is not injurious to the child, but for its welfare. (82 Va. 433; 567; 95 Va. 707).

To invade this parental right of custody by abduction is a civil injury for which the parent may have redress at

law for damages, or the custody may be restored on a writ of habeas corpus where the child is under 14, but where over that age, he is merely released from illegal custody and left to choose for himself; or by a suit for the purpose, or on decreeing a divorce either from the bond or from bed and board, or even pending such suit, the custody of the children may be decreed (§§ 5107, 5111, 5326).

A violation of the right of custody is also a criminal offense—see *Abduction* section 2, (1).

Where any husband and wife live in a state of separation without being divorced, the court or judge in vacation, upon petition of the mother, after reasonable notice, and proof (which may be by deposition) may award the custody of a minor child to the mother, under such regulations, restrictions, etc., as may be best, or make an order merely for the access of the mother (Code, §§ 5327-30).

Taking a child from its lawful custodian is also punished criminally—see title *Abduction*.

§ 4. Correction of children by parents.—The parent, whether father or mother, and a teacher (who stands in the place of the parent) in a less degree, may lawfully administer such moderate and reasonable correction of a child as is for the benefit of his training and education (1 Minor, 427, 434); and a minor under 16, guilty of a misdemeanor, may (in place of the punishment otherwise provided) be ordered by the justice or judge to be whipped by the parent or guardian, or some one selected by the justice or judge (Code, § 1924).

§ 5. When parent entitled to child's services and wages.—The father, or the mother (if she is the legal custodian of their minor child), is entitled to the services and earnings of the child (Code, § 5320); unless indeed the parent relinquishes the claim, which is easily implied, as, where the child has for some time been permitted, without objection, to receive his wages himself, or is living apart from his father with his consent or is married, or is left to manage his own affairs, and to make and execute his own contracts for a considerable time, or even if the father knew of such contract and made no objection. (1 Minor, 215, 429-30.) The wages of a minor is not liable to garnishment, or other-

wise liable to the payment of the debts of parents. (Code, § 6558. See also, *Employer and Employee*, section 3; and *Guardian and Ward*, section 5.

§ 6. Consent of parent to child's marriage.—Where the child is under 21 years, and has not been previously married, consent of the parent or guardian must be given as provided in the statute (Code, § 5078; or see title *Marriage*, section 4); but the marriage is not made void for the want of such consent, if the license be issued (Code, § 5082).

§ 7. Parent has no control over minor's estate.—This power belongs to the guardian duly appointed. See *Guardian and Ward*.

PARLIAMENTARY LAW.

See By-Laws

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§ 1. Definition, origin, and general nature.—Briefly, it is the system of common sense rules and generally adopted usages, by which deliberative assemblies are governed. These rules or usages, not being statutory nor a part of the common law, and as they may be supplanted by other rules adopted by the assembly or body, they are not law in the technical legal sense of being rules of conduct for citizens (not public assemblies), prescribed by the law-making body of a state, commanding what is right and prohibiting what is wrong; but they are rules which common experience and usage have found necessary and convenient and which public assemblies or gatherings have uniformly adopted, for the orderly, convenient and practicable conduct of their business. These rules had their origin in the practice of the English Parliament, hence called "Parliamentary law"; but in the United States they have been gradually modified, so as to be better adapted to our people; and the practice of Congress, especially the House of Representatives, and of our national conventions and also state legislative bodies, have helped to fashion our parliamentary law and practice to suit the tastes and needs, the genius and institutions of our country. The rules in these different bodies are somewhat varying, but the general rules and principles of parliamentary law are the same for public assemblies or legislative bodies, where no others have been specifically adopted. It is usual and safer, however, to adopt some one's compilation or manual for the government of the particular body, organization, or society; as Jefferson's, Cushing's or Fish's Manual, Reed's or Robert's Rules of Order, or Mell's Parliamentary Practice, or Cushing's Law and Practice of Legislative Assemblies or Gore's Rules of Congress, or Hackett's The Gavel and the Mace, or Stevens' Law of Assemblies, or Kerfoot's Parliamentary Law, or McTyeire's "Rules of Order Applicable to Ecclesiastical Courts and Conferences," in his "Manual of Discipline," etc. Laws made by any particular body for its own special government are usually called "rules."

§ 2. Different kinds of assemblies.—They are: (1) Permanent assemblies, as, United States or State Senate, House of Representatives, House of Delegates, certain boards of trustees, boards of managers, church conferences, associations, conventions, clubs, societies, and other bodies not pro-

viding for its dissolution, but having a permanent existence of some sort; (2) occasional assemblies, of various kinds, which are called for some temporary, special purpose, and when this is accomplished they adjourn; as, constitutional conventions, political conventions (county, state, or national), councils to organize a church or ordain a minister, etc., (in all which cases the members represent constituencies and therefore require credentials), and temperance meetings, or any kind of mass-meeting.

§ 3. Organization.—An assembly is organized when it has a president (sometimes called chairman, speaker, or moderator) and a secretary or clerk, though others, as, vice-president, assistant secretary, treasurer, etc., are frequently elected. Let the one presiding at the organization strictly enforce the rule that, pending organization nothing is in order except what pertains to organization.

(1) *Of permanent assemblies.*—In the first, or original, organization of such assemblies, and in the absence of any special rule or statute upon the subject, such bodies must organize just as would occasional assemblies (see (2) below).

Some permanent assemblies have to reorganize from time to time. In some cases this reorganization is provided for by special constitutional or statutory enactment, as, for example, in our State legislatures. Where this is the case, the law should be followed literally. Where no such provision exists, the usual plan is as follows: (1) The officers previously elected continue in office until their successors are elected. (2) When the time for the election arrives, the president and secretary of the previous meeting, if present, will take their proper places. (3) The president will call the body to order. (4) If there is to be any religious exercise, it should come at this point. (5) The president will then call for a proper roll of the names of those entitled to sit as members of the body. (6) The roll must be made out by the secretary according to the rule which has been adopted or agreed to by the body. (7) When the roll is properly made out, the secretary will read the list. (8) The president will then announce that the body is ready to proceed to the election of officers, and that nominations for president are in order. Any number of nominations may be made. But any one may, at any time, make a motion to close nomi-

nations. A nomination does not need to be seconded, although this is often allowed. If the former president is renominated, he will yield the chair, for the time being, to a vice-president, or to some one else not in nomination. (9) After the nominations cease, or are closed by vote, the presiding officer will order the vote to be taken for president as is provided for by the constitution or by-laws. If there is no way specified for taking the vote, the president may take it as he sees fit, or the body may determine this by special vote. (10) If the election is by ballot, the president should appoint a committee to distribute blanks, and to collect and count the ballots. When the constitution or any special rule provides for holding an election by ballot, it is not in order for the secretary, or any one member to cast the ballot for any nominee, except under special provision, or by unanimous consent. (11) It is allowable to proceed with the election of a secretary, or secretaries, while the ballots for president are being counted. (12) As soon as the presiding officer learns, through those appointed to count the ballots, the result of the election for president, it is his duty to announce the result and to have the newly elected president take the chair. Usually a committee is appointed to conduct the president-elect to the chair. (13) The newly elected president will then complete the organization of the assembly by holding the elections for other officers in so far as this is unfinished.

If the secretary of the previous meeting is absent, and the former president is present, the first business will be the election of a temporary secretary. If the president of the previous meeting is not present, the highest vice-president who is present should take his place and organize the meeting. If neither the president nor any one of the vice-presidents is present, the secretary, if present, acts for this purpose. If none of the former officers are present, the assembly must secure officers just as would be done by an occasional assembly—(see (2), below).

(2) *Of occasional assemblies.*—(a) *Where no credentials and election not so important.*—(1) Some one rises and calls the meeting to order. He may, if he wishes, state why they have assembled, and call for nominations for president, or he may make a nomination himself. Others may rise and address the first speaker, and, when recognized by him, make

other nominations. (2) Seconds are not necessary to nominations, but they are generally allowed. (3) When the nominations cease, or are closed by vote, the person acting as spokesman, or president pro tem, will take the vote on the nominations. The vote must be taken on the names in the order in which the nominations have been made until some one has a majority. In case there is difficulty in securing a majority, it is usual, after the first few votes or ballots, to pass a resolution that after a certain ballot the one having the fewest votes be dropped. (4) The person receiving a majority of all the votes should be immediately invited by the temporary chairman to take the chair and complete the organization. He does this by calling for nominations for the other offices, putting the question upon the nominations and declaring the result of the votes, and calling upon those elected to take their places.

(b) *When credentials, or election is important.*

(1) Here there will be held first an election for temporary officers, just as in the last case. In this temporary organization those having *prima facie* evidence of right to seats are entitled to vote. The person acting as chairman may decide who these are. But an appeal from his decision to the assembly may be taken. (2) Then some member will move the appointment of a committee on credentials. (3) When the committee is appointed, those claiming the right to membership will be asked to hand in their credentials if this has not already been done. The committee will then retire and consider these credentials and prepare a report on the same and offer this report through its chairman to the body as soon as possible. (4) It is usual, also, after the committee on credentials is appointed, to appoint a committee to nominate permanent officers. The one making this motion may name the committee in the motion, or may move that the chair appoint the committee; or any one may suggest or move the appointment in some other way of the committee on nominations, and the body may appoint accordingly, or in any other way that it sees fit. While, however, it is usual to appoint such a committee it is not necessary. The assembly may elect directly, without any committee on nominations. (5) Pending the examination of the credentials by the committee, the body may entertain itself with speeches, or engage

in religious exercises, or adjourn until such time as it will hear the report of the committee on credentials. (6) After the report of the committee on credentials has been acted upon, the next business in order will be the election of permanent officers. If there has been appointed a committee on permanent organization, the report of this committee is called for. If this report is adopted, the temporary chairman will invite the officers elected to take their places, and the temporary officers will retire. It is usual in such cases to appoint some one to conduct the president-elect to the chair. The body is now ready for business, being fully organized. If the report of the committee on nominations or permanent organization, be rejected, the matter may be referred back to the same committee, or to a new committee, or the body may elect officers upon public nomination. (Kerfoot's Parliamentary Law, pp. 9-13.)

§ 4. Credentials.—Credentials are the letters, or evidence, that one can give that he has been chosen or appointed to be a member of the assembly. There is no difference in essential principle between permanent and occasional bodies as to the rules applicable to credentials. Only in permanent assemblies there is no need for the election of temporary officers, since the old officers act as the temporary officers.

In some assemblies the matter of credentials is very important, in order to prevent unauthorized persons from getting into the assembly and influencing or controlling its action. There are some assemblies, however, especially some religious assemblies, where the credentials serve scarcely any other purpose than to afford a correct list of members for publication. In such assemblies the matter of credentials is comparatively unimportant.

When credentials are required, they should be inquired into before the election of permanent officers, unless there is some special rule or usage to the contrary. For there is no purpose that can be served by credentials more important than that of determining who may take part in the organization of the assembly.

In some assemblies (for example legislatures, etc.) there is a special law as to credentials, and, of course, where this is the case, such law governs in the matter; and it must be obeyed literally.

In religious assemblies there are various methods as to credentials.

When, for any reason, special inquiry needs to be made as to credentials, whether in a religious, or other kind of assembly, the proper way is for some one to move the appointment of a committee on credentials; and, in the motion, he may either name persons to be appointed, or suggest that the chair appoint such a committee, or make any other suggestion that he may see fit to make as to the appointment of the committee. The president should put the motion to the assembly as it has been made.

When such a committee is appointed, it should take charge of the whole matter of credentials; and as a committee, make such examination of the offered credentials as will bring out the facts; and report to the house upon the subject as soon as possible, stating which persons, in the judgment of the committee, are entitled to seats. If there are rival claims, or if the right of any one to a seat is on any account challenged, this committee should investigate these matters also, and report upon them to the body.

In case any member is not satisfied with the report of the committee, he may offer a motion in the assembly to amend or change the report of the committee, and the assembly will, by vote, decide whether to accept the report of the committee, or make the proposed change.

In case the report is adverse to any one's claim to a seat, the party whose claim is thus disputed should be heard by the assembly in his defense. Then he should withdraw. Or if not required to withdraw, he should remain silent unless invited to speak again. In no event should he vote upon his own case. A person whose right to a seat is challenged, may, however, vote on all questions not affecting his own rights, provided he can show the required *prima facie* evidence of his right to a seat. (Kerfoot's Parliamentary Law, pp. 13-15.)

§ 5. *Quorum*.—(1) *Meaning*.—The word quorum, in Parliamentary Law, means a number agreed upon, or provided for in some way, as necessary to be present in a deliberative assembly in order to the transaction of business. The principle of the quorum is that a sufficient number ought to be present to give authority and weight to the decisions reached.

(2) *Number required.*—In some assemblies no quorum is required. This is true of some churches (as, of an annual or district conference of the Methodist Church), and of assemblies that are not representative or judicial. In other assemblies the quorum is fixed by special rule, or statute, e. g., in Congress, and in most legislative assemblies. Any deliberative assembly may fix by a rule of its own, the quorum when the same is not otherwise fixed by higher law. When not so fixed by law, or special rule, or recognized custom, it requires a majority of the enrolled members to make a quorum in ordinary assemblies. In assemblies the number of whose members is fixed by constitutional provision or law, e. g., legislative assemblies, the quorum consists, if not otherwise provided for, of a majority of those who ought to have been elected, and not simply a majority of those in attendance. In bodies where many of those elected may not attend, the quorum should consist of a majority of those in attendance at any annual session. This is especially true of many religious associations and conventions. Otherwise it would frequently be impossible to transact any business.

(3) *No business without a quorum.*—In assemblies where a quorum is required, no business can be begun if it is known that a quorum is not present, and if business is in progress it should stop when it is ascertained that no quorum is present. The chair, however, is not bound, either in taking the chair or in the progress of business, to take notice of the absence of a quorum, unless his attention is called to the matter, or some special rule requires him to do so. This would, in many cases, be very onerous to the chair, and very undesirable to the assembly. A quorum is always supposed to be present unless attention is called to the contrary. Even vote after vote may be taken where a quorum does not vote, and still a quorum is supposed to be present until some one raises the point of "no quorum."

(4) *What a smaller number may do.*—A smaller number than a quorum may continue in session and endeavor to secure a quorum, or it may adjourn from time to time until a quorum is secured; and in some assemblies special provision exists for sending after, and even compelling the attendance of, absent members. If no time has been fixed for the next meeting, the assembly, even if there be no quorum, may fix

the time; otherwise, an adjournment would be a dissolution.

(5) *How ascertained.*—(1) The presence or absence of a quorum is usually ascertained by roll call, or by some vote that is counted; or it may be ascertained by an actual count of those present by the chair, or the secretary, under the instructions of the chair. (2) Sometimes it is settled by special rule how the quorum is to be ascertained. It ought always to be so settled where any question can arise as to the proper method of ascertaining the presence of a quorum. Our Lower House of Congress has had great trouble in this particular. It seems, however, to be now settled that the chair may count those in sight.

(6) *The principle of the quorum should not be violated.*—Even in assemblies where a quorum is not actually required, the principle of the quorum should always be observed, and no important business should be transacted until a reasonable number of the members can be gotten together. It is far better to adjourn, and for the time leave the business unattended to, than to violate this principle. If violated, however, a larger number can, at any subsequent meeting, reconsider or repeal the objectionable action.

(7) *Where members leave during the session.*—In bodies where many members leave before the close of the session, it is usually wise not to raise a question of quorum. It should never be done on the last day of the session, as there is generally much routine business to be attended to which is comparatively unimportant, and yet sufficiently important to demand attention. Oftentimes it would happen that to raise a question of quorum on the last day would require the assembly to adjourn without transacting this routine business. This is especially true of many religious gatherings. (Kerfoot's Parliamentary Law, pp. 15-18.)

§ 6. *Officers.*—(1) *President.*—(a) *Qualifications.*—To be a good presiding officer, one should have quick perception, and, with this, a good judicial mind, so that he may be able to see quickly all points involved, and decide fairly upon all questions. He should be entirely impartial in all his rulings, trying to give to every one his rights. He should be thoroughly familiar with the law by which the assembly is governed. He should be a man of even temper, and one who will be at all times gentlemanly in his bearing towards every

one, and thus avoid all friction in his management of the body. He should have tact to turn aside quickly and easily the various occasions for friction that inevitably arise among members. And, above all, he should be a man of promptness and firmness in all decisions. A man who is slow to decide a question, and to any degree wavering after a decision, is unfit to be a presiding officer. The presiding officer must be president while he presides. If a president is not right in any decision, it can easily be corrected by appeal or otherwise. But for a president to waver means confusion, and inability on the part of the assembly to transact business. (Kerfoot's Parliamentary Law, 18-19.)

(b) *Duties.*—They are: (1) To call the members to order at the appointed time.

(2) To conduct the opening religious service, or appoint some suitable person to do so, where that is customary.

(3) To direct the roll to be called at the opening of each session, unless otherwise ordered, and have the records of the previous session read, corrected, if necessary, and approved.

(4) To call up the business, in order. When no order of proceeding has been prescribed, the president may present or entertain any business that, in his judgment, should come before the body. The usual order of business is reading of the minutes, reports of standing committees, reports of special committees, special orders of the day, and introduction of new business. In an Annual and Quarterly Conference of the Methodist Church, the regular questions are brought forward by disciplinary authority, and at the president's discretion, as to time and circumstances.

(5) To entertain all propositions, made in order; to put to the vote all questions that may properly arise, and declare the result; to enforce order and decorum in debate; to decide all questions of law; to give the floor to the one entitled to it when two or more rise and claim it about the same time; to give information when referred to on points of order; to appoint committees when directed in a particular case, or when a regulation requires it; and to authenticate, by his signature, all acts and proceedings of the assembly.

(6) All messages and communications addressed to the body should be received and opened by the president thereof, and by him announced. These communications should constitute the first item of business.

Not only do all written communications reach the assembly through the president, but personal and verbal ones also. If any agent wishes to gain the attention of a body, or any visitor or fraternal delegate is to be introduced, the president should first be notified, and consenting to the arrangement. When a stranger is brought forward to the chair for the purpose of being introduced, or "invited to a seat within the bar," the president not having been previously consulted, it sometimes occasions unpleasant delays or interruptions; and the embarrassment is increased, if he be not a proper person to be introduced to that body.

(7) He may propose what appears to him the most regular and direct way of bringing any business to issue.

(8) He should carefully keep notes of the orders of the day, and call them up at the times appointed. (McTyeire's Manual of the Discipline, 214-16.)

(c) *Rights and privileges.*—The president does not, by reason of being president, forfeit any of his rights as a member of the body. He can at any time call some one else to the chair, and take his place upon the floor as a private member, and have all the rights that any other member has. It is, however, better that a president should be involved as little as possible in the debates and contests of the body. He should keep himself as far as possible from everything like partisanship as to any measure, and only claim his right to take part in the ordinary proceedings when he feels that it is really his duty to do so. When he does this, he should always call some one else to the chair. No president has the right to remain in the chair while trying to forward his own views on any disputed case. He need not leave the chair to discuss an appeal. He should usually not vote on any question except in case of a tie vote. He is expected, by reason of his office, to vote in cases of tie. He may, however, even then refuse to vote, if he so desires, in which case the measure fails for lack of majority. Still the president has the right to vote on any measure if he so chooses. It is only a question of wisdom as to the exercise of this right. But the president who insists on exercising this right will very likely soon fail to command that respect which is due to a presiding officer. When, however, a president represents a constituency, and their interests demand that he should vote, then it is his duty to vote. He may not

sacrifice his responsibility to his constituents because of his position as president. (Kerfoot's Parliamentary Law, p. 20.)

He may speak to points of order in preference to other members, rising from his seat for that purpose, and decide questions of order subject to an appeal, without debate, by any two members.

(2) *Secretary.*—(a) *Qualifications.*—The secretary also should be fairly well acquainted with parliamentary law, especially with all the law pertaining to his official duties. He should be a man of quick perception, so as to be able to catch readily and accurately motions that are not put into writing by the mover. He should be able to express himself in clear and accurate language, so that he can put into form verbal motions and language that he is required to report. He should be a quick reader of manuscript, and a good and impressive reader before the assembly. He should be able also to keep the record in an easily legible handwriting, and in such an orderly way that any one may easily gather from his minutes just what the assembly has meant to put to record. He should be one who will do willingly and promptly anything that is required of him in the line of his duties as secretary. He undertakes to be a true servant of the body.

(b) *Duties.*—He should always be at his desk when the meeting is called to order; keep an accurate list of the members; take down all motions that are stated by the chair, unless the same are already in writing; read all papers to the assembly as directed by the chair; keep an exact record of every motion that receives a majority vote, and of all business that is actually transacted by the body, whether by motion or otherwise. In some assemblies he is required to keep a record of all motions and all business proposed. He should learn, on entering upon his office, what the body requires of him as to its record. He should call the roll of the assembly whenever ordered to do so by the chair or the assembly, and report to the chair the result of any such roll call. He should take charge of all lists of committees that may be appointed, and notify the chairman of such committees of their appointment, furnishing each chairman with a list of the entire committee, and with such information as may be needed

concerning the appointment and the duties of the committee. He should be ready, at all reasonable times, to give information to any member of the body as to any matter of business of which he is required to keep a record. He should take charge of all papers turned over to him by the president, or by the body, and be ready to produce such papers at any time when they may be properly called for. No one has any right to withdraw papers from his keeping except in accordance with the rules of the assembly, or upon the consent of the secretary. And the secretary should see that this rule is observed. He should promptly and cheerfully obey any special order of the body as to the manner in which he shall keep the record of proceedings, and as to all papers intrusted to him, and, in fact, as to everything pertaining to his work as secretary. He should affix his signature to any papers or proceedings when the same is required for the proper authentication of the acts of the assembly.

(c) *Rights and Privileges*.—It is as true of the secretary as of the president that he forfeits none of his rights as a member by reason of his holding office in the service of the body. He has a right to vote on all questions, and the same reason against the exercise of this right does not exist in his case as in the case of the president. He need not leave his desk to take part in any of the proceedings of the body unless he desires to do so. The only limit to his taking part in all proceedings is his obligation not to neglect the special duties he has undertaken for the body. He is entitled to the respect and consideration of all members of the body in the discharge of his duties, and to protection against all unreasonable demands on the part of members.

(3) *Other Officers.—Qualifications and duties*.—The qualifications and duties of any other officers that a deliberative assembly may have besides a president and secretaries must be determined usually from the provisions of the constitution or by-laws that require such officers to be elected or appointed. Such officers are, as a rule, entitled to all the rights and privileges of other members of the body. (Kerfoot's Parliamentary Law, pp. 21-24.)

§ 7. *Members*.—

(1) *Rights*.—(a) *Equality*.—All members upon the floor of the body have equal rights, and are entitled to equal priv-

ileges and consideration from the officers and the other members.

(b) *Right to introduce and discuss measures.*—Each member has the right to introduce any proper measure to the attention of the body, and to discuss the same, if it be a debatable question, and to use all parliamentary means for securing the end which he may have in view. He cannot claim this, however, except within the recognized limits of parliamentary law.

(c) *Right to protection.*—Each member is entitled to be protected by the president, and by the body, in the exercise and enjoyment of all his rights and privileges as a member of the body. For this purpose a member may rise at any time to a question of personal privilege and courteously demand that he be protected in the enjoyment of his rights and privileges as a member of the body. Nothing but a motion to adjourn can interfere with this privilege of a member to rise and claim his personal rights. If the assembly should adjourn, pending such question of privilege, then as soon as it reconvenes, the question of privilege is first in order. If the chair refuses to protect him, he may appeal to the body. He has, however, no right to resist a decision made by the body, except by withdrawal from its membership.

(2) *Duties of members.*—(a) *Should respect the officers of the body.*—Each member should show the utmost respect and courtesy to the officers of the body. If a member is dissatisfied with the conduct of any officer, he may, in a respectful way, appeal to the body. But he should not show irritation or disrespect towards an officer. Disrespect to an officer is disrespect to the body.

(b) *Should respect fellow members.*—Each member should be careful of the rights of fellow members. He should treat them with every courtesy and consideration, avoiding everything like unparliamentary language and all infringement upon their privileges. Members should even be careful to observe all the finer amenities and courtesies of gentlemen in their intercourse one with another. Nothing contributes more to the pleasant association of members in a deliberative assembly, and to the successful conduct of business, than attention to these finer amenities and courtesies.

(c) *Should show due respect to the body.*—Each member should refrain from doing anything in violation either of the rules of the assembly or of the general parliamentary law recognized by the assembly. All due consideration should be shown in every way for the body. In no case should a member reflect upon the character of the body. Even if one cannot always conform to its known wish or temper, he should nevertheless show the utmost possible respect for the body in his speech and bearing.

(d) *Should render required service.*—Each member should cheerfully render to the body and its officers all services that may be required of him; and in case of failure to do so, either on account of inability or for any other reason, he should promptly report such failure, and the reason therefor.

(e) *Should submit to decisions.*—Each member should promptly and cheerfully submit to all decisions of the body. If he cannot do this, he ought to withdraw from its membership. (Kerfoot's Parliamentary Law, pp. 25-26.)

§ 8. Obtaining the floor.—Before any one can introduce a matter of business in a deliberative assembly, or claim the attention of the body for any purpose, he must first obtain the floor. If a member tries to introduce a measure, or to make a speech, or to interrupt another, without properly obtaining the floor, he is out of order, and the president should require him to desist. More of the disorder and confusion of deliberative assemblies is due to a disregard for this rule than to any other cause. And so, while a president should not seem to be a stickler for mere technicalities, he should, for the good of the assembly, let members see that this rule must be observed.

If any member of the body wishes to obtain the floor for the introduction of business, or for any purpose whatever, he must rise and address the chair, saying "Mr. President" (or he may say, "Mr. Moderator," or address the chair in any way that is customary in the body). If the president recognizes him by calling his name, or by indicating in any way that he may proceed, such an one has the floor and may proceed to introduce any matter of business. (See next section, on motions.)

If the president himself wishes to bring any communication to the attention of the body, or to call attention to

any matter, he has only to judge as to the proper time, and ask the attention of the body to what he has to lay before it. For this purpose he may even interrupt one who has the floor. But he should be very careful in doing this, lest he be guilty of discourtesy, and possibly provoke an appeal to the house against his intrusion. If, however, he desires to bring before the assembly any business in which he is personally interested, he should call some one else to the chair, and take his chances of obtaining the floor just as other members have to do.

Outside parties have no right to the floor. They can have any matter introduced only through the president or some one of the members. But neither the president nor any member is under obligation to bring any matter from an outside person, or body, to the attention of the assembly. Each member may act in such matters entirely upon his own judgment. (Kerfoot's Parliamentary Law, pp. 26-28.)

§ 9. *Motions.*—

(1) *The proper means for introducing measures.*—After one has obtained the floor, he presents any matter of business for the consideration or action of the body by means of what is called a motion. This is done by the words, "I move," etc., or, "I desire to make a motion," or, "I move the following," or, "I move the adoption of the following" (stating immediately what is to follow), or he may simply say, "I offer" so and so. Very often the word "motion" is not used at all. Yet a motion is actually involved. That is to say, one, in some way moves, starts, puts in motion, something on its way through the body. One may, without any motion, call the attention of the assembly to a matter, or he may sometimes preface a motion by explanatory remarks. But when a matter of any kind is introduced for consideration, and for action upon it by the body, a motion must be offered before any speech can be made, or any action can be taken upon it.

(2) *Motions must be seconded.*—All motions that are really motions require a second. This is on the principle that the attention of a deliberative assembly ought not to be asked to any measure where only one of the body is willing to ask for such attention. A second is made by some one simply saying, "I second the motion," or "I second it."

The member seconding a motion need not rise, nor address the chair, nor be recognized by the chair for this purpose. He may remain in his seat and simply say, "I second the motion." Mr. Reed says one should arise.

(3) *Motions may be required to be in writing.*—All motions must be put in writing if so required by the president, or secretary, or by any member. It is not usual, however to require this for the ordinary motions such as frequently recur. (Kerfoot's Parliamentary Law, pp. 28-29.)

§ 10. Resolutions, orders, petitions, bills, or acts.—A deliberative assembly may express its decisions in the form of a resolution, an order, a petition, a bill (or an act). And the motion which one makes may be for the passage of either of these.

(1) *Resolution.*—Strictly speaking, every decision by a deliberative assembly is a resolution—that is, something resolved. But in common use, a resolution means a formal expression of opinion upon some subject, which expression of opinion is presented as the decision of the assembly. When one wishes the assembly to pass a resolution, he usually says: "I move the adoption of the following resolution," and then he reads the resolution, and passes it up to the secretary. Resolutions are, however, not always offered thus formally. Frequently the mover of a resolution says: "I move that it be the sense of the body," etc., or, "I move" so and so—stating after the word "move" what he wishes the house to agree to.

(2) *An order.*—If that which is moved for adoption by the assembly be in the nature of a command, then, instead of being called a resolution, it is called an Order.

(3) *A Petition.*—Sometimes the thing desired of a deliberative assembly is action upon a petition. Some one will present the petition to the body. A motion and second are required before it can be considered or acted upon.

(4) *A bill or act.*—If the deliberative assembly is a legislative body, and if the thing which is moved for adoption is in the nature of a proposed statute, or law, it is called a Bill. When passed by the assembly it is called an Act.

All important resolutions and orders, and all petitions and bills should be presented in writing. Any member has the right to require that they be so presented. (Kerfoot's Parliamentary Law, pp. 29-30.)

§ 11. **"Question."**—When any measure has been brought before a deliberative assembly, and a motion has been made, and seconded, for its adoption, it is the duty of the chair to repeat, or re-read the proposition, or to have it read by the secretary. He will preface this re-reading, or re-statement of the measure, by saying, "The question is upon the adoption of the following motion," or "Mr. A. moves the following." Then the measure will be read, or stated, and the chair will say: "The question is upon its adoption," or "The question is upon the adoption of," etc. This is the meaning of what is called "the question" in Parliamentary Law. It is so called because the proposition which has been made to the body now takes the form of a question, upon which an answer or decision must be rendered. If the question thus raised has grown out of an original, or main, proposition, it is called the main question. Such questions as arise in connection with a settlement of the main question are called subsidiary or incidental or privileged questions, as the case may be. These will all be considered under their appropriate headings.

When any measure, or proposition, reaches this stage, so that there is a question or decision, it may be said to have been properly introduced for the consideration of the body. It is then in the hands of the assembly, awaiting its action upon it. It is said then to be "before the house." (Kerfoot's Parliamentary Law, pp. 30-31.)

§ 12. **Voting.**—Votes may be taken in deliberative assemblies either by sound of voices, or by show of hands, or by separation of members, or by yeas and nays, or by ballot. In all cases the object is to find out which side of a question is favored by a proper majority of those present.

(1) *Voting by sound of voices.*—By far the easiest and most frequent way of taking the vote of an assembly is by the sound of voices. When the vote is to be taken the president rises and says: "Are you ready for the question?" If there is no further claim to the floor, he proceeds to say: "As many as are in favor of the motion will say 'Aye.'" Then he will say: "As many as are of a contrary mind will say 'No,'" or, "As many as are opposed will say 'No.'" If the vote is such that it is clear from the mere sound which side has a majority, the president will say: "The ayes have

it," or, "The noes have it," as the case may be. If the president is not certain from the sound, he should say: "The ayes seem to have it," or, "The noes seem to have it." Then, if no one calls for a division, he will announce the vote positively as he understood it. When a vote is thus taken, by sound of voices, those members who fail to vote are understood as acquiescing with the majority. A presiding officer may often expedite business by assuming unanimous consent. When he feels sure that all are of the same mind upon a proposed measure, he may say: "If there is no objection, it will be so ordered." If, after this, there is no objection, it will be equivalent to a unanimous vote. If, however, there is objection, the proposition must be put to the vote. A president should not assume unanimous consent except upon unimportant matters, and then only when he is confident that it will be agreeable to the assembly.

(2) *Voting by show of hands.*—Taking the vote by show of hands is the next easiest method of deciding a question. It often happens that the president is not able to decide positively from *viva voce* sound which side has a majority. He may prefer a more accurate way. It happens frequently also that one or more of the members may be dissatisfied with a decision from the mere sound, and some one calls out, "Division." In either case there must be some way of counting the votes. The president should never hesitate to have the vote counted if he is uncertain, or if any one calls for a division before the assembly passes to another matter. After this it is too late. It is no reflection upon the chair for a member to ask for a division. It is only a demand for certainty. The usual way to have the count is to say: "As many as are in favor hold up your hands until counted." Then, "As many as are opposed indicate it by the same sign." When the result is ascertained the president announces it. The president may do the counting himself if he so desires. It is better, however, for him to have it done by persons specially recognized or appointed for this purpose. Such persons are called tellers. Usually the secretaries will act as tellers. In all cases where the assembly consists of opposing parties or factions, the different parties should be fairly represented in the counting. The teller announces the vote, as counted, and the chair repeats the announcement.

In a vote by show of hands no account is taken of those not voting, except as they may be considered in a question of quorum.

(3) *Voting by separation.*—The next easiest way of voting is by a separation of the members. Sometimes it happens that even a show of hands is not sufficiently reliable, and then a vote may be taken by separating the members. (1) This may be done most easily by asking those in favor of the measure to “rise and stand until counted;” and then saying to these, “be seated,” and asking those opposed “to stand until counted.” The counting here is done as in the last case. (2) Other plans, sometimes resorted to, are to have the members pass before the secretary, or take different parts of the house, or withdraw in some way to themselves, so that each side may be counted separately. The counting should be done as in the last two cases. In any vote by separation no account should be taken of those not voting, except as their presence may affect the matter of a quorum. While this careful, and sometimes laborious, method of counting should be readily granted in important cases where there is any real doubt as to the vote, yet it is clear that it is not a right which any and every member may claim, unless there is some special provision for it in the rules of the body. For, if so, it could be used greatly to the obstruction of business. If the chair refuses to order a vote by separation, any member may move as an incidental question, that the vote be so taken, and the assembly will decide.

(4) *Voting by yeas and nays.*—(a) *A plan for recording each vote.*—Voting by yeas and nays is a method of voting by which every person’s vote is taken separately and put upon record, so that the votes may not only be accurately counted, but kept for future reference.

(b) *Special object.*—The special object of a vote by yeas and nays is usually to make each member feel the responsibility for his vote by making him answer individually, and by putting his vote upon record, so that all may know just how he votes, and so that his constituents, if he has any, may be able to know from the record just how their representative has voted upon any particular question.

(c) *How taken.*—The president announces that “the roll will be called, and all those in favor of the motion, when

their names are called, will vote yea, and all those opposed will vote nay." A tally is kept by the secretaries, or by tellers specially appointed, showing as a matter of record how each member voted. Generally, there is a teller for each party. When the roll is called, the clerk, or one of the tellers, will first read over the names of those who voted in the affirmative, and then of those who voted in the negative, that errors, if any have been made, may be corrected. The number on each side then reported to the presiding officer, and by him announced to the assembly.

(d) *Obligation to vote.*—When the yeas and nays have been ordered, every member is under obligation to vote, unless excused by the assembly.

(e) *Abuse of this method of voting.*—Where the rules allow a small number of members to call the yeas and nays on any and all sorts of questions, this is one of the favorite methods of filibustering and staving off action upon measures which are opposed. This opportunity to abuse might be defeated by a judicious suspension of the rule as to the call for yeas and nays, or by a rule requiring a majority vote, or the vote of a large proportion of the assembly, for a call of the yeas and nays upon all questions except the main question and amendments.

(f) *When debate must cease.*—In the case of a vote by yeas and nays, as the affirmative and negative votes proceed at the same time, it is out of order to renew the debate after the first vote has been given. (Mr. Reed says: "After the first name has been called, the call cannot be interrupted even by the arrival of the hour appointed for adjournment.") In all the other votes referred to above, one may claim the floor for debate and so stop the voting up to the time when the negative vote is heard.

(g) *Right to change one's vote.*—"No member, after the yeas and nays have been called, is permitted to change his vote unless he asserts that he voted by mistake. This is the general rule, but in some of our legislative bodies members are permitted to change their votes even after the business is disposed of, provided such change does not affect the general result." It is hardly true that this rule, given by Dr. Mell, still prevails. It is quite common to call for a recapitulation of the vote, and pending this to allow any one who wishes to do so to change his vote.

(h) *Number required to order the yeas and nays.*—It is usual to have some special rule providing how many it shall require to call for a vote by yeas and nays. In case there is no rule upon the subject, a majority should be required in order to compel such a vote. This will prevent much abusive use of this method of voting.

(i) *Not often applicable to religious bodies.*—The principle of a vote by yeas and nays will rarely have any application in a religious assembly. It has been argued by some that it ought never to be applied, as it indicates a condition of feeling, or will lead to a condition of feeling, that ought not to exist in a religious assembly, and is likely to have results which can be fraught only with evil.

(5) *Voting by ballot.*—It is frequently the case that constitutional or other provision requires that certain votes shall be “by ballot.” When such a vote is required, tellers are appointed (usually by the president) to distribute among the members blank slips of paper upon which the vote may be written. He will then state the question, and call upon the members to vote, and require the tellers to collect the ballots, and, after that, to withdraw and count and record the same. When the tellers shall have performed this duty, they will return to the assembly, and the chairman, or first named of the committee of tellers will secure the floor as soon as possible, and say: “The tellers are ready to report.” If the report can be heard then, the chair will say: “Let the report be made.” The report will then be announced by the teller just as it stood upon the count, and the chair will rule accordingly. If, for any reason, the report could not be received when it was first announced that it was ready, the chairman of the tellers must seek the first opportunity that presents itself for making his report. As has been before intimated, an effort is sometimes made to avoid the requirement of a vote by ballot. The usual way for doing this is to move that the secretary cast the ballot for the assembly in the manner indicated. This is never allowable except under special provision, or where there is unanimous consent. (Kerfoot’s Parliamentary Law, pp. 32-37.)

§ 13. *The parliamentary gauntlet of motions, etc.*—But many experiences may happen to a measure by way of motions, etc., after its proper introduction into the body and before

final vote upon it, and here is where the principles of parliamentary law come into play to promote or to delay or defeat it, with all the intricate questions of precedence of motions, debate, amendments, postponing and suppressing questions, reconsideration, adoption of motions, etc., briefly stated below. The first 6 heads are taken from the admirable brief presentation in Johnson's Encyclopedia by Mr. Roberts. For these and the other heads, see also Kerfoot's unexcelled fuller presentation, and the excellent compilation by Bishop McTyeire in the Manual of the Discipline, which works have been so freely used in this article.

§ 14. Precedence.—During the consideration of a question it is not in order to introduce any other principal question, but it is allowable to make other motions that will aid in disposing of the main question, or that arise incidentally during the proceedings, or that relate to the enforcement of the rules, or to the privileges of the assembly or its members or to closing the meeting, or to the time of the next meeting. The most common of these have the following order of precedence, any one being in order (except to amend) when one of lower rank is pending, and every one being out of order when one of higher rank is pending: To fix the time to which to adjourn, adjourn, orders of the day, lay on the table, previous question, postpone to a certain time, commit or refer, amend, and postpone indefinitely. Questions incidental to those before the assembly take precedence and must be decided first. (Johnson's Ency.)

§ 15. Debate.—Every motion is debatable, except such as from their nature or privilege can not be debated without injury to the business before the assembly. Debate can not be allowed on highly privileged motions, as to adjourn, or they could be used to prevent the assembly from transacting any business. A motion to close debate must necessarily be undebatable, or its very object could be defeated. The following motions can not be debated: Fix the time to which to adjourn; adjourn; for the orders of the day and questions relating to priority of business; appeal when previous question is pending or when relating to indecorum or to transgression of rules of speaking or to priority of business; objection to consideration of question; lay on the table or take from the table; previous question, and all motions extending,

limiting, or closing debate or allowing one to continue speaking after being guilty of indecorum in debate; reconsider an undebatable question; question relating to suspending the rules, withdrawing a motion, or reading papers. Debate must be confined to the one question before the assembly at the time, other questions being discussed only so far as they have a bearing on the question immediately before the assembly, except that when the decision of the pending question finally disposes of the main question, then the latter is open to debate also. Thus the motion to postpone indefinitely, having the effect of rejecting the question, if carried, opens to debate the merits of the question it is proposed to postpone; but the motion to postpone to a certain time, if carried, does not finally dispose of the question, and therefore debate is limited to the propriety of the postponement. The common parliamentary law, and the rules of Congress till quite recently, made one exception to this principle, by making the motion to refer to a committee open the main question to debate, evidently on the ground that the discussion would aid the committee in understanding the views of the assembly. Under the House rules, however, it is rare that there is a motion or vote on referring anything to a committee, the reference being made by the chair without a vote as provided for by the rules, or as requested by the member introducing it; if a motion to refer is made it is now very properly undebatable. The common parliamentary law rule is better adapted to ordinary deliberative assemblies, for, if the motion to refer were undebatable, it would enable a bare majority immediately to suppress a question without debate by moving to refer it to an unfriendly committee. A motion to reconsider a debatable question or to rescind a vote opens for discussion the merits of the main question.

Debate can be closed or its limits diminished or increased by a two-thirds vote. The motions for these purposes are as follows: (a) The previous question, which cuts off debate and brings the assembly at once to a vote on the pending question, which, in case of the motions to commit or to amend, includes the question to be committed or amended, unless it is demanded simply on the motion to commit, or on the amendment, or on an amendment to the amendment; (b) a motion limiting debate as to the number and length of speeches, or specifying the time at which debate upon the question shall

close; (c) a motion extending these limits in general or for a single speaker. Any of these motions may be applied to a single amendment, and after it is voted on, the main question is still open for amendment and debate. (Johnson's Ency.)

§ 16. Amendments.—The assembly can modify the main question by adopting amendments, or it may be referred to a committee who can report amendments for adoption by the assembly. An amendment may be by adding or inserting, by striking out, by striking out and inserting, by substituting, or by dividing the question. An amendment may itself be amended, but not so as to alter its form, nor can any parliamentary motion be amended so as to become a motion of another form. Thus a motion to strike out can not be amended so as to become a motion to strike out and insert, nor can to postpone to a certain time be amended so as to become a motion to postpone indefinitely. An amendment of an amendment can not be amended. While an amendment is pending it is not in order to make another motion to amend the resolution, but after one amendment is disposed of another can be offered and so on without limit. In legislative bodies it is found best in addition to an amendment of the second order to permit an amendment in the nature of a substitute and one amendment to the latter, all to be pending at the same time. While this is useful in legislative and analogous bodies, it would merely produce confusion in ordinary deliberative assemblies. The following motions can not be amended: Adjourn (when unqualified), for the orders of the day, all incidental questions, lay on the table, the previous question, an amendment of an amendment, postpone indefinitely, and reconsider. (Johnson's Ency.)

§ 17. Postponing and suppressing questions.—Action upon a question may be deferred by postponing it to a certain time; or, if it is intended to reserve the power to take it up at any time, it should be laid on the table; or, if it is desired to set apart a particular time when it shall have special right of way, it should be made a special order for a certain time, which motion requires a two-thirds vote for its adoption. The assembly may suppress the question as follows: (a) When first introduced, before debate or action thereon, any member may, even while the mover has the floor,

object to the introduction of the question, and if the objection is sustained by a two-thirds vote, the question is dismissed for that session, thus enabling the assembly to avoid having its time taken up with irrelevant or profitless questions. (b) After the question has been debated, the proper way to suppress the question is to vote it down or postpone it indefinitely, which has the same effect, except that if it fails the original question is not adopted as it would have been had the vote been taken on adopting the main question. Since to postpone indefinitely opens the main question to debate, when this motion is made with a view to suppressing the question immediately, it is necessary also to demand the previous question, just as it is when it is desired to bring the assembly to an immediate vote on the main question. (c) While the fundamental principles of parliamentary law require a two-thirds vote to suppress the question without free debate, yet in most cases it can be practically accomplished by a majority vote on the motion to lay the question on the table. In the U. S. Congress, where the calendar is so full and party lines strictly drawn, the most common method of killing a question is to lay it on the table. In voluntary organizations, where mutual good feeling and co-operation are desired, questions should not be suppressed without debate unless by a two-thirds vote, as described above, and the motion to lay on the table should be confined to its strict parliamentary use of laying aside a question to be taken up at a more convenient time. Where it is desired to kill simply an amendment, it will not do to lay it on the table, as this carries with it the resolution also. (Johnson's Ency.)

§ 18. Reconsideration.—To protect the assembly from having questions reintroduced repeatedly at the same session, and yet to give reasonable freedom for correcting errors due to hasty action, parliamentary law in the U. S. provides that no principal question (resolution or report) or amendment that has been once acted upon shall be again taken up at that session except by a motion to reconsider or rescind; but the motion to adjourn can be renewed if there has been progress in a debate or any business transacted, and, as a general rule, privileged, incidental, or subsidiary motions (excepting to suspend the rules for the same purpose, and for

the orders of the day while the same principal question is pending) can be renewed if a motion has been made that alters the state of affairs. On the day a vote is taken, or on the next day if a meeting is held then, a member who voted on the prevailing side can move to consider the vote, and this motion can be made when any other question is before the assembly, or even when another member has the floor; but in such case it is only entered on the record to be called up afterward, as it can not interrupt pending business. After the motion has been made all action under the resolution is suspended until the reconsideration is disposed of. If the mover does not call up the motion within the time allowed for making it, then any one can call it up and have a vote taken. If the motion to reconsider is carried the question is in the same condition as immediately before the vote was taken, and therefore must be disposed of in the same way. Where the assembly regrets action that it has taken and it is too late to reconsider the vote, the proper way is to rescind the objectionable vote, which a majority can do. (Johnson's Ency.)

§ 19. Adoption of Motions.—A majority of the votes cast when a quorum is present is all that is necessary, in the absence of a special rule to the contrary, for the adoption of any motion (except those stated below) that does not suspend or change any rule or custom of deliberative bodies or of the assembly. A quorum, or the number that must be present in order that business may be transacted, is a majority of all the members of the organization where there is no number specified by rule, which should always be done. It is sometimes less than 1 per cent. of the members, as in the British House of Lords, where it is 3 out of about 450 members. The following motions come under the above exception, and require a two-thirds vote for their adoption: To amend or suspend the rules; to make a special order or take up a question out of its proper order; to object to the consideration of a question; to close or limit or extend the limits of debate; and the previous question. The right to introduce questions germane to the objects of the assembly, and discuss them before their final disposition, is inherent to the fundamental idea of a deliberative assembly; but these rights, like that of having the rules enforced, must yield to the convenience

of an overwhelming majority. A two-thirds vote can not, however, suspend any article of the constitution or by-laws (unless they provide for such suspension of a specified by-law), nor can it suspend any right or privilege given to less than one-third of the members present, as otherwise the privilege would be of little value. (Johnson's Ency.)

§ 20. Protest.—A protest is a solemn and formal declaration by members in a minority, bearing their testimony against what they deem a mischievous action or erroneous judgment of the majority, and is generally accompanied with a detail of the reasons on which it is based.

None can join in a protest against a decision, except those who had a right to vote on said decision.

If a protest be couched in decent language, and is respectful to the body, it must be recorded. The body whose action is dissented from may, if deemed necessary, put an answer to the protest on record, along with it. Here the matter must end, unless the protestors obtain permission to withdraw their protests absolutely, or for the sake of amendment. (McTyeire's Manual of the Discipline, 230-1.)

For minority report of committee see section 21, (3), below.

§ 21. Committees.—(1) *In general.*—A committee is a small body of members appointed to obtain information, to digest papers, and to put resolutions into a form suitable to come before the assembly for action. It may be impossible for all the members to examine thoroughly, each for himself, every item of business presented. Hence, a committee as a body, and each member of it personally, should give special attention to every subject referred.

Committees are of two kinds—standing and special. A standing committee is appointed for the session, and to it all matters of a certain character as they arise are referred. It may make several reports.

A special or select committee examines and reports upon a special subject. The adoption of its reports dissolves it, without any further action. But its report may be received, and action thereon postponed; or the committee may be discharged and the subject referred to another committee.

If a committee, standing or special, makes a report in which the assembly desires certain alterations, the report may be recommitted.

The rules of order that govern the main assembly apply in most cases to committees; for a committee is but a miniature assembly.

When a subject is referred to a committee with instructions, those instructions must be carried into effect. In other cases, the committee may report as it judges best.

Committees are appointed by the President, unless the general rule or special order of the assembly otherwise designates.

[In the General Conference of the Methodist Church, the usage is that the delegates of each Annual Conference select one of their number to serve on each of the standing committees. In the Annual Conferences, a committee on nominations is usually appointed, to suggest names on the various standing committees. The report of this committee is subject to amendment, like any other report. It is in order, though not common, for the member who proposes the appointment of a special committee, to present at the same time a list of persons to compose it, who shall consider and report upon the matter referred to them. This proceeding, under certain circumstances, is not calculated to give weight to the report. Almost any deliberate method of appointment is better than nomination at random, and election by acclamation in a promiscuous assembly.]

When a committee has been ordered without any number being specified, the next thing to be decided is the number that shall compose it. This is effected in the manner of filling blanks—the largest number proposed being put to the vote first, and proceeding down till a majority is obtained. The member moving the appointment of a special committee is usually put upon it, for the reason that he is presumed to be acquainted with the matter, or takes a particular interest in it. He is named first, by courtesy.

When a bill or other paper is referred to a committee for amendment in its particulars, so as to make it acceptable to the assembly, no one who is known to be opposed to the body or substance of the proposition ought to be appointed on the committee, for the reason that he who would totally destroy will not amend. "The child is not to be put to a nurse that cares not for it," say the old parliamentarians. It is therefore a parliamentary rule, "that no man is to be

employed in any matter who has declared himself against it." Those who take exceptions to some particulars in the bill or paper, are very proper persons to be on the committee. This rule relates exclusively to the case in which the committee are not to consider the general merits of a proposition, but only the amendment of it in its particulars, so as to make it acceptable to the assembly.

The person first named on a committee is considered the chairman, whose duty it is to convene the committee and preside therein; and in case of his absence, or inability to act, the next named takes his place and performs his duties.

(2) *Reports of committees.*—A motion for the reception of a report is unnecessary, unless objection be made to its consideration at that time. After the report has been read, such a motion is superfluous; it has already been received, and the only pertinent motion is to adopt it, or otherwise dispose of it.

The report of a committee should always conclude with a resolution or resolutions, recommending definite action. If the committee would have the assembly commit itself to certain opinions, or adopt any line of policy, or express any wish, it should be cast in the form of a distinct resolution. In this shape its proposition can be accepted, rejected, or modified readily, and as may be agreeable.

A report may state facts and arguments, and conclude by condensing them in the form of a resolution, or a series of resolutions; or it may consist of resolutions, without preliminary observations.

Where a committee merely reports facts and the result of deliberations, without any specific recommendation or proposition, the report should terminate with, "Resolved, That this committee be discharged from the further consideration of the subject."

When a report consists of a series of resolutions on distinct subjects, the president puts the question on each separately, and but once. If the resolutions are on the same subject, and he puts the question on each separately, afterwards it may be necessary to put it upon them as a whole. The reason is, that such changes may have been introduced by amending some of the resolutions as to make the series unacceptable. When there is a preamble, the natural order

of beginning at the beginning is reversed, in acting on the report: the resolutions must first be voted on, and then the preamble. The reason is, that such changes may be made in the former, as to make alterations necessary for conforming to the latter.

(3) *Minority reports*.—If a committee is not unanimous in opinion, the minority may place their views before the assembly in the form of a separate report. After the reading of the majority report, a member moves that it be laid on the table, or that action on it be postponed, in order to hear the minority report. If the motion prevails, as generally it will, the report of the minority will be read. The purpose for which the majority report was laid on the table or postponed having been served, that report, without further motion, is before the assembly for consideration. It may be adopted with or without amendment, or the minority report may be substituted for it, or the whole matter may be re-committed, or referred to a new committee.

A committee should labor to come to agreement: Division frustrates in part the object of its appointment. Whenever a committee is divided in reporting, the following are the appropriate terms: "The undersigned, a majority of the committee on —, etc., beg leave to submit the following report," etc. And, "The undersigned, a minority of the committee," etc. (McTyeire's Manual of the Discipline, 232-9.)

For protest by members in minority, see section 20, above.

§ 22. 300 points of order.—Trace up each reference at the right, and then look up the corresponding numbers, in the table following, which will give the full information desired.

Forms in which questions may be put.....	28, 29, 30, 31, 32
Questions of precedence of questions.....	19, 20, 21, 22, 23, 24, 25
Motion to withdraw a motion.....	1, 5, 7, 9, 13, 14, 16
To take up a question out of its proper order.....	1, 5, 7, 9, 12, 14, 16
Motion to take from the table.....	1, 5, 7, 11, 12, 14, 16
Motion to suspend the rules.....	3, 5, 8, 10, 13, 14, 16
To substitute in the nature of an amendment.....	3, 5, 8, 9, 13, 14, 16
Motion to make subject a special order.....	3, 5, 8, 9, 12, 14, 16
Question whether subject shall be discussed.....	1, 5, 7, 9, 12, 15, 17
Motion that committee do not rise.....	1, 5, 7, 10, 13, 14, 16
Motion to refer a question.....	3, 6, 8, 10, 13, 14, 16
Motion to reconsider an undebatable question.....	1, 5, 7, 10, 13, 14, 18

Motion to reconsider a debatable question.....	3, 6, 7, 10, 13, 14, 16
Reading papers	1, 5, 7, 9, 13, 14, 16
Questions of privilege.....	3, 5, 8, 9, 13, 14, 16
Questions touching priority of business.....	1, 5, 8, 9, 13, 14, 16
Motion for previous question.....	1, 5, 7, 9, 13, 14, 16
Motion to postpone indefinitely.....	3, 6, 7, 9, 13, 14, 16
Motion to postpone to a definite time.....	4, 5, 8, 9, 13, 14, 16
Motion for the orders of the day.....	1, 5, 7, 9, 13, 15, 17
Objection to consideration of question.....	1, 5, 7, 9, 12, 15, 17
Motion to limit debate on question.....	1, 5, 8, 9, 12, 14, 16
Motion to lay on the table.....	1, 5, 7, 11, 13, 14, 16
Leave to continue speaking after indecorum.....	1, 5, 7, 9, 13, 14, 16
Motion to extend limits of debate on question.....	1, 5, 8, 9, 13, 14, 16
Motion to commit	3, 6, 8, 9, 13, 14, 16
Motion to close debate on question.....	1, 5, 8, 9, 12, 14, 16
Call to order	1, 5, 7, 9, 13, 15, 17
Motion to appeal from Speaker's decision generally	3, 5, 7, 9, 13, 14, 17
Motion to appeal from Speaker's decision <i>re</i> in- decorum	1, 5, 8, 9, 13, 14, 17
Motion to amend the rules.....	3, 5, 8, 9, 12, 14, 16
Motion to amend an amendment.....	3, 5, 7, 9, 13, 14, 16
Motion to amend.....	3, 5, 8, 9, 13, 14, 16
Motion to determine time to which to adjourn....	2, 5, 8, 9, 13, 14, 16
Motion to adjourn	1, 5, 7, 10, 13, 14, 16

1. Question undebatable; sometimes remarks tacitly allowed.
2. Undebatable if another question is before the assembly.
3. Debatable question.
4. Limited debate only on propriety of postponement.
5. Does not allow reference to main question.
6. Opens the main question to debate.
7. Cannot be amended.
8. May be amended.
9. Can be reconsidered.
10. Cannot be reconsidered.
11. An affirmative vote on this question cannot be reconsidered.
12. Requires two-thirds vote, unless special rules have been enacted.
13. Simple majority suffices to determine the question.
14. Motion must be seconded.
15. Does not require to be seconded.
16. Not in order when another has the floor.
17. Always in order though another may have the floor.
18. May be moved and entered on the record when another has the floor, but the business then before the assembly may not be put aside. The motion must be made by one who voted with the prevailing side, and on the same day the original vote was taken.
19. Fixing the time to which an adjournment may be made; ranks first.
20. To adjourn without limitation; second.

21. Motion for the Orders of the Day; third.
22. Motion to lay on the table; fourth.
23. Motion for the previous question; fifth.
24. Motion to postpone definitely; sixth.
25. Motion to commit; seventh.
26. Motion to amend; eighth.
27. Motion to postpone indefinitely; ninth.
28. On motion to strike out words, "Shall the words stand part of the motion?" unless a majority sustains the words they are struck out.
29. On motion for previous question the form to be observed is: "Shall the main question be now put?" This, if carried, ends debate.
30. On an appeal from the chair's decision, "shall the decision be sustained as the ruling of the house?" The chair is generally sustained.
31. On motion for Orders of the Day. "Will the house now proceed to the Orders of the Day?" This, if carried, supersedes intervening motions.
32. When an objection is raised to considering question, "Shall the question be considered?" objection may be made by any member before debate has commenced, but not subsequently.

PARTIES (CHANGE OF)

See Trials

For chapter as to death or change of parties, and the discontinuance of causes not prosecuted, see Code, §§ 6164-74.

PARTITION

See Adjoining Land-Owners

I. VOLUNTARY PARTITION

- §1. Voluntary partition in case of joint tenants, or tenants in common
- § 2. Voluntary partition in case of co-parceners

II. COMPULSORY PARTITION

- § 1. Who compellable to make partition
- § 2. When shares of two or more laid off together

- § 3. When allotment or sale
- § 4. Sale bars dower and curtesy
- § 5. Decree of partition vest legal title
- § 6. Partition or division of personal property
 - (1) Before a justice where from \$20 to \$300 in value
 - (2) In court of equity
- § 7. Partition or sale of homestead exemption
- § 8. Recordation of order of partition
- § 9. Forms under "Partition"

This subject will be presented under the two heads of voluntary partition and compulsory partition.

I. VOLUNTARY PARTITION

§ 1. **Voluntary partition in case of joint tenants, or tenants in common** (see "*Co-Tenants*," sections 1 and 9).—Where all the co-tenants are of age and sane, and agree, the partition can and must be made by deed, in the case of a fee simple or life estate in lands, or of a term of more than five years in land (Code, § 5141). Even an agreement to make partition may be enforced in equity, though not under seal, whenever a similar agreement to convey would be enforceable (112 Va. 731); but if the contract is for the partition (which is a conveyance) of real estate, the contract must be in writing (Code, § 5561, cl. 6). (1 M's Real Prop., §§ 900-3.)

§ 2. **Voluntary partition in case of co-parceners** (see "*Co-Tenants*," section 14).—It had been repeatedly held that a partition among co-parceners is not a conveyance, because the partition makes no degrees, but leaves each parcener seized as by descent from the common ancestor, and that partition between co-parceners could be made verbally as well as by deed (76 Va. 487; 86 Va. 642, 649; 100 Va. 660); but by the Code of 1887 (see Code 1919, § 5141), it is expressly provided that "a voluntary partition of lands by co-parceners," in case of a fee simple or life estate, or for a term of more than five years in lands must be by deed. If the estate is for a term less than five years, a deed or contract in writing even does not seem necessary, such a partition not being a "contract for the sale of real estate" (Code, § 5561, cl. 6), as above stated.

For the doctrine of bringing advancements into the partition among co-parceners, see *Advancement*.

II. COMPULSORY PARTITION

§ 1. Who compellable to make partition.—By section 5279 of the Code, tenants in common, joint tenants, and coparceners (see *Co-Tenants*) are compellable to make partition by proper court proceeding in equity; and a lien creditor or any owner of an undivided estate in real estate may likewise compel partition for the purpose of subjecting the estate of his debtor or the rents and profits thereof to the satisfaction of his lien; and the court will decide all questions of law arising affecting the legal title between “such tenants in common, joint tenants, coparceners, and lien creditors”.

§ 2. When shares of two or more laid off together.—It may be done, if they so elect, when the partition can be conveniently made in that way. (Code, § 5280.)

§ 3. When allotment or sale.—When partition cannot be conveniently made, the entire subject may be allotted to any party who will accept it, and pay to the others what they are entitled to; or if the interest of all will be promoted by a sale, or allotment of part and sale of the residue, the court, though some are minors or insane, may order such sale, or allotment and sale, making distribution according to rights of the parties, and of any creditor or lienholder. Where the part of a party exceeds \$500, if the party is a minor or insane, the court directs its investment as in the case of lands sold of persons under disability (ch. 217 of Code); if \$500 or less, the same is paid to the guardian or committee properly bonded, or the court may direct its payment to the minor or to one of his parents or to some other person for his benefit, under section 5343; but if the interest of any party be held in trust, his part, regardless of the amount, is paid to the trustee, he giving proper bond. (Code, § 5281, as amended by Acts 1922.)

The proceeds of sale, not required to be invested, is deemed personal estate from the time of the confirmation of the sale; but if required to be invested, they are deemed real estate. (Code, §§ 5283, 5347.)

A lessee holds on the same terms as before the partition or sale. (Code, § 5285.)

If the name or share of one interested is unknown, the bill should state such facts as are known. (Code, § 5284.)

§ 4. Sale bars dower and curtesy.—A sale for partition bars dower and curtesy (Code, § 5281).

§ 5. Decree of partition vests legal title.—A decree confirming a partition or allotment vests in the respective co-owners, "in like manner and to the same extent as if the said decree ordered such title to be conveyed to them and the conveyance was made accordingly." (Code, § 5282.)

§ 6. Partition or division of personal property.—(1) *Before a justice, where from \$20 to \$300 in value.*—By statute where personal property of greater value than \$20 and not over \$300 is owned jointly by two or more persons, and a sale or partition thereof cannot be agreed to, any party in interest may file a petition before a justice where the property is or one of the defendants resides, stating the facts which may authorize the sale or division. A copy of the petition is served on the defendants at least 10 days before the hearing. Upon appearance by any defendant and affidavit that there is a material defense to said petition, and that it is not made for delay, the justice forthwith removes the case to court for trial, which may be had after 10 days' notice. If the justice, upon the hearing, thinks the interests of the parties require that the property should be sold, he directs a sale by the sheriff or constable, upon terms prescribed by him, and after the sale is made and reported to him, he provides for the payment of the costs "and a division of the money among the parties entitled as their rights may be made to appear." If, however, he thinks the property cannot be sold, but should be divided, he appoints three disinterested commissioners to make the division according to the rights of the parties, after being first duly sworn and inspecting the property, they reporting to the justice. A party has 10 days to file exceptions to the report, and these exceptions, 10 days after being filed, are passed upon by the justice. If no exceptions, the justice endorses upon the report an order confirming the same and directing payment of the costs by any or all of the parties. From the final judgment, whether in case of sale or partition, any party may appeal to court, upon giving surety (verbally taken) for the payment of the judgment in court, and costs and damages. (Acts 1920, p. 468; Pol. Code Bien. 1920, p. 464.)

(2) *In court of equity.*—By section 5286 of the Code: "When an equal division of goods or chattels cannot be made in kind among those entitled, a court of equity may direct the sale of the same, and the distribution of the proceeds according to the rights of the parties."

§ 7. **Partition or sale of homestead exemption.**—If the homestead exemption in real estate be held by the householder as joint tenant, co-parcener, or tenant in common, partition or sale may be as in other cases of partition, and in the case of sale, his share shall be paid to him and invested by him in such other property as he may select. (Code, § 6534.)

§ 8. **Recordation of order of partition.**—The order of partition is recorded where the land is, in the Deed Book or "Hand Book," and indexed. (Code, § 5216), and § 3393, as amended by Acts 1920, p. 313.)

§ 9. **Forms under "Partition."**

No. 1. **VOLUNTARY DEED OF PARTITION (BETWEEN TENANTS IN COMMON, JOINT TENANTS, OR CO-PARCENERS)**

This deed, made this ——— day of ———, 192—, between A. B., party of the first part, and C. D., party of the second part:

Witnesseth, that, whereas the said parties to this deed, are seised in fee-simple of, and have equal shares as tenants in common (or *joint tenants*, or *co-parceners*), in a certain lot, piece, or parcel of land lying and being in the county of ———, and bounded as follows, etc. [here describe the property]:

Now, therefore, to the end and intent that a perfect partition may be had and made by and between the said parties of the said lot, piece, or parcel of land, they, the said A. B. and C. D., by their own mutual consent and agreement, have and do hereby make partition of the same in manner following: The said A. B. shall have for his part and portion of the said lot, piece, or parcel of land, all that part thereof lying and being (here describe A. B.'s portion) in severalty, and divided from the portion of said C. D. And the said C. D. shall have for his part and portion of the said lot, piece, or portion of land, all that part thereof lying and being (here describe C. D.'s portion) in severalty, and divided from the portion of the said A. B. And the said A. B., in consideration of the provisions contained in this deed, doth grant unto the said C. D., with special warranty, all etc. (here describe the property to be conveyed to C. D.). And the said C. D., in consideration of the provisions contained in this deed, doth grant unto the said A. B., with special warranty, all etc. (here describe the property to be conveyed to A. B.).

Witness the following signatures and seals.

A. B. (SEAL.)
C. D. (SEAL.)

No. 2. FORMS OF **BILLS AND DECREES IN PARTITION SUITS**

[See Hurst's Forms, Nos. 76 to 78, and 207 to 210.]

PARTNERSHIPS

(Acts 1918, pp. 541-55, §§ 1-45; Pocket Code, p. 165; Pollard's Code Biennial 1920, p. 365.)

*See Partition***PART I. PRELIMINARY PROVISIONS**

- § 1. Name of act
- § 2. Definition of terms
- § 3. Interpretation of knowledge and notice
- § 4. Rules of construction
- § 5. Rules for cases not provided for in this act

PART II. NATURE OF PARTNERSHIP

- § 6. Partnership defined
- § 7. Rules for determining the existence of a partnership

PART III. RELATION OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP

- § 9. Partner agent of partnership as to partnership business
- § 10. Conveyance of real property of the partnership
- § 11. Partnership bound by admission of partner
- § 12. Partnership charged with knowledge or notice to partner
- § 13. Partnership bound by partner's wrongful act
- § 14. Partnership bound by partner's breach of trust
- § 15. Nature of partner's liability
- § 16. Partner by estoppel
- § 17. Liability of incoming partner

PART IV. RELATIONS OF PARTNERS TO ONE ANOTHER

- § 18. Rules determining rights and duties of partners
- § 19. Partnership books
- § 20. Duty of partners to render information
- § 21. Partner accountable as a fiduciary
- § 22. Right to an account
- § 23. Continuation of partnership beyond fixed term

PART V. PROPERTY RIGHTS OF A PARTNER

- § 24. Extent of property rights of a partner
- § 25. Nature of a partner's right in specific partnership property
- § 26. Nature of partner's interest in the partnership
- § 27. Assignment of partner's interest
- § 28. Partner's interest subject to charging order

PART VI. DISSOLUTION AND WINDING UP

- § 29. Dissolution defined
- § 30. Partnership not terminated by dissolution
- § 31. Causes of dissolution
- § 32. Dissolution by decree of court
- § 33. General effect of dissolution on authority of partner
- § 34. Right of partner to contribution from co-partners after dissolution
- § 35. Power of partner to bind partnership to third persons after dissolution
- § 36. Effect of dissolution on partner's existing liability
- § 37. Right to wind up
- § 38. Rights of partners to application of partnership property
- § 39. Rights where partnership is dissolved for fraud or misrepresentation
- § 40. Rules for distribution
- § 41. Liability of persons continuing the business in certain cases
- § 42. Rights of retiring, or estate of deceased, partner, when the business is continued
- § 43. Accrual of actions

PART VII. MISCELLANEOUS PROVISIONS

- § 44. When act takes effect
- § 45. Legislation repealed

[PART VIIA. CODE PROVISIONS AND OTHER ACTS]

- § 45a. If factor, agent, etc., who is a trader, fail to disclose name of principal or partner, or do business in his own name, property used in such business liable for his debts; exception
- § 45b. When proof of partnership unnecessary unless denied by affidavit
- § 45c. Limitation of action for settlement of accounts
- § 45d. What license to contain; effect of change of partners or name
- § 45e. Presentment of negotiable paper to partners
- § 45f. Notice of dishonor to partner
- § 45g. Taxation of partnerships
- § 45h. Partnerships and persons doing business under assumed or fictitious name to file certificate of name and facts in the clerk's office
- § 45i. Forms of agreements for partnerships

We have two partnership acts passed in 1918, making the law uniform in many states, (1) as to partnership in general, given below, and (2) as to limited partnerships, given under the next title. These two acts are so complete, concise, and important that we give them in full.

Some of the differences between a partnership and a cor-

poration is—(1) a partnership is a voluntary, unincorporated association of individuals, whose legal relation is based upon their agreement, and needs no special statutory authority to effectuate it; they continue to act in this relation as individuals, sue and are sued in their individual names, and the death or bankruptcy of a partner and many other causes terminates the relation; and each partner is personally liable for all debts and wrongful acts and breaches of trust; on the other hand a corporation is a distinct legal entity created by legislative authority, and acts in its corporate capacity only, without regard to the individuals who compose it; it sues and is sued in its corporate name, and the death of one or more corporators does not dissolve it or affect its existence; and individual corporators are not liable for the debts of the concern.

PART I. PRELIMINARY PROVISIONS

§ 1. Name of act.—This act may be cited as uniform partnership act.

§ 2. Definition of terms.—In this act, “court” includes every court and judge having jurisdiction in the case.

“Business” includes every trade, occupation, or profession.

“Person” includes individuals, partnerships, corporations and other associations.

“Bankrupt” includes bankrupt under the Federal bankruptcy act or insolvent under any State insolvent act.

“Conveyance” includes every assignment, lease, mortgage, or encumbrance.

“Real property” includes land and any interest or estate in land.

§ 3. Interpretation of knowledge and notice.—(1) A person has “knowledge” of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

(2) A person has “notice” of a fact within the meaning of this act when the person who claims the benefit of the notice.

(a) States the fact to such person, or

(b) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

§ 4. Rules of construction.—(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) The law of estoppel shall apply under this act.

(3) The law of agency shall apply under this act.

(4) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those States which enact it.

(5) This act shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect.

§ 5. Rules for cases not provided for in this act.—In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

PART II. NATURE OF PARTNERSHIP

§ 6. Partnership defined; [applies to limited partnerships].—(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this State, or any statute adopted by authority, other than the authority of this State, is not a partnership under this act, unless such association would have been a partnership in this State prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

§ 7. Rules for determining the existence of a partnership.—In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section sixteen, persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing

them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

- (a) As a debt by installments or otherwise.
- (b) As wages of an employee or rent to a landlord.
- (c) As an annuity to a widow or representative of a deceased partner.
- (d) As interest on a loan, though the amount of payment vary with the profits of the business.

(e) As the consideration for the sale of the good-will of a business or other property by installments or otherwise.

§ 8. Partnership property.—(1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

PART III. RELATION OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP

§ 9. Partner agent of partnership as to partnership business.—(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for

the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership,

(b) Dispose of the good-will of the business,

(c) Do any other act which would make it impossible to carry on the ordinary business of the partnership,

(d) Confess a judgment,

(e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on his authority shall bind the partnership to persons having knowledge of the restriction.

§ 10. Conveyance of real property of the partnership.—

(1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section nine, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section nine.

(3) Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of section nine, unless the purchaser or his assignee, is a holder for value, without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section nine.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

§ 11. Partnership bound by admission of partner.—An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.

§ 12. Partnership charged with knowledge of or notice to partner.—Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

§ 13. Partnership bound by partner's wrongful act.—Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

§ 14. Partnership bound by partner's breach of trust.—The partnership is bound to make good the loss:

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

§ 15. Nature of partner's liability.—All partners are liable

(a) Jointly and severally for everything chargeable to the partnership under sections thirteen and fourteen.

(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

§ 16. Partner by estoppel.—(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so given credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

§ 17. Liability of incoming partner.—A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.

PART IV. RELATIONS OF PARTNERS TO ONE ANOTHER**§ 18. Rules determining rights and duties of partners.—**

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(d) A partnership shall receive interest on the capital contributed by him only from the date when repayment should be made.

(e) All partners have equal rights in the management and conduct of the partnership business.

(f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(g) No person can become a member of a partnership without the consent of all of the partners.

(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

§ 19. Partnership books.—The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

§ 20. Duty of partners to render information.—Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

§ 21. Partner accountable as a fiduciary.—(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

§ 22. Right to an account.—Any partner shall have the right to formal account as to partnership affairs:

(a) If he is wrongfully excluded from the partnership business or possession of its property by his co-partners,

(b) If the right exists under the terms of any agreement,

(c) As provided by section twenty-one,

(d) Whenever other circumstances render it just and reasonable.

§ 23. Continuation of partnership beyond fixed term.—

(1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is *prima facie* evidence of a continuation of the partnership.

PART V. PROPERTY RIGHTS OF A PARTNER

§ 24. Extent of property rights of a partner.—The property rights of a partner are: (1) His rights in specific

partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

§ 25. Nature of a partner's right in specific partnership property.—(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of his tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, courtesy, or allowances to widows, heirs or next of kin.

§ 26. Nature of partner's interest in the partnership.—A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

§ 27. Assignment of partner's interest.—(1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee,

during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

§ 28. Partner's interest subject to charging order.—(1) On due application to a competent court by any judge-creditor of a partner, the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

PART VI. DISSOLUTION AND WINDING UP

§ 29. Dissolution defined.—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

§ 30. Partnership not terminated by dissolution.—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

§ 31. Causes of dissolution.—Dissolution is caused

(1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business *bona fide* in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section thirty-two.

§ 32. Dissolution by decree of court.—(1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business.

(d) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that

it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections twenty-eight or twenty-nine:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

§ 33. General effect of dissolution on authority of partner.—Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy, or death of a partner; or

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where section thirty-four so requires.

(2) With respect to persons not partners, as declared in section thirty-five.

§ 34. Right of partner to contribution from co-partners after dissolution.—Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his co-partners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved, unless

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

§ 35. Power of partner to bind partnership to third persons after dissolution.—(1) After dissolution a partner can bind the partnership except as provided in paragraph (3)

(a) By an act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs, except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1b II).

(4) Nothing in this section shall affect the liability

under section sixteen of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

§ 36. Effect of dissolution on partner's existing liability.

—(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

§ 37. Right to wind up.—Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.

§ 38. Rights of partners to application of partnership property.—(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a

partner, *bona fide* under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities either by payment on agreement under section thirty-six (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

(I) All the rights specified in paragraph (1) of this section, and

(II) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2a II) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2a II), of this section,

(II) If the business is continued under paragraph (2b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the goodwill of the business shall not be considered.

§ 39. Rights where partnership is dissolved for fraud or misrepresentation.—Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(a) To a lien on, or right of retention of the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

§ 40. Rules for distribution.—In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are:

(I) The partnership property,

(II) The contributions of the partners necessary for the payment of all liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than partners,

(II) Those owing to partners other than for capital and profits,

(III) Those owing to partners in respect of capital,

(IV) Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section eighteen (a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and,

in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(h) When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

(I) Those owing to separate creditors,

(II) Those owing to partnership creditors,

(III) Those owing to partners by way of contribution.

§ 41. Liability of persons continuing the business in certain cases.—(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights, in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section thirty-eight (2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

§ 42. Rights of retiring, or estate of deceased, partner, when the business is continued.—When any partner retires or dies, and the business is continued under any of the conditions set forth in section forty-one (1, 2, 3, 5, 6), or section thirty-eight (2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section forty-one (8) of this act.

§ 43. Accrual of actions.—The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

PART VII. MISCELLANEOUS PROVISIONS

§ 44. When act takes effect.—This act shall take effect on the first day of July, 1918.

§ 45. Legislation repealed.—All acts or parts of acts inconsistent with this act are hereby repealed. (Acts 1918, pp. 541-55, §§ 1-45.)

[PART VII A. CODE PROVISIONS AND OTHER ACTS]

§ 45a. If factor, agent, etc., who is a trader, fail to disclose name of principal or partner, or do business in his own name, property used in such business liable for his debts; exception.—If any person transact business as a trader, with the addition of the words “factor,” “agent,” “and company,” or “and co.,” and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town or county wherein the same is transacted; or if any person transact such business in his own name, without any such addition; all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such persons, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant. (Code, § 5224.)

And a recordation of a contract, deed or other writing under section 5194 of the Code does not affect the rights of a creditor acquired under the above section (5224). (Code, § 5194, as amended by Acts 1922.)

§ 45b. When proof of partnership unnecessary unless denied by affidavit.—Where plaintiffs or defendants sue or are sued as partners, and their names are set forth in the declaration or bill, the partnership need not be proved unless the same be denied by affidavit. (Code, § 6127.)

§ 45c. Limitation of action for settlement of accounts.—Five years from the cessation of dealings between them. (Code, § 5810.)

§ 45d. What license to contain; effect of change of partners or name.—The license must state the names of the members, except of silent members, or a member joining the firm after the license issued. Changing the firm name, adding a new member, or the withdrawal of one or more, is not commencing new business, if any of the old members still remain; and if they dissolve, and one or more continues business, any tax on the purchases, sales or profits which might otherwise be chargeable to the firm, may be apportioned among them according to the justice or the case. (Code, §§ 2364-5.)

§ 45a. Presentment of negotiable paper to partners.—Where the persons primarily liable are partners and no place of payment is specified, presentment for payment may be made to any one of them even though there has been a dissolution of the firm. (Code, § 5639.)

§ 45f. Notice of dishonor to partner.—Notice to one is notice to the firm, even though there has been a dissolution. (Code, § 5661.)

§45g. Taxation of partnerships.— See *Taxation and Tax Bill.*

§45h. Partnerships and persons doing business under assumed or fictitious name to file certificate of names and facts in the clerk's office.—By acts 1922, p. —: "No person nor corporation shall conduct or transact business in this State under any assumed or fictitious name unless such person or persons or corporation shall sign and acknowledge a certificate setting forth the name under which such business is to be conducted or transacted, and the names of each and every person or corporation owning the same, with their respective post office and residence addresses, and where the corporation is a foreign corporation the date of the certificate of authority to do business in Virginia issued to it by the State Corporation Commission, and file the same in the office of the clerk of the court in which deeds are recorded in the county or corporation wherein the business is to be conducted.

"No two or more persons shall carry on business as co-partners unless they sign and acknowledge a certificate setting forth the full names of each and every person composing the co-partnership, with their respective post office and residence addresses, the name and style of the firm, the length of time for which it is to continue, and the locality of their place of business, and file the same in the office of the clerk of the court in which deeds are recorded in the county or corporation wherein the business is to be conducted. And every change in such co-partnership must be evidenced by a new certificate. The clerk with whom the certificate provided for in this, and the preceding section of this act is filed, shall keep a book in which all such certificates shall be recorded, with their date of record, and shall keep a register in which shall be entered in alphabetical order the name under which

every such business is conducted, and the names of every person owning the same. The clerk shall be entitled to a fee of 50 cents for filing and recording such certificates and entering such names.

"Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not exceeding \$1,000, or imprisonment not more than 6 months, or both." [The act also provides that a copy of the certificate of a corporation, duly attested by the clerk, must be filed with the State Corporation Commission. The act applies to existing concerns.]

§45i. Forms of agreements for partnerships.—

NO. 1. ARTICLES OF GENERAL PARTNERSHIP

(4 Min. Inst. 1589; Matthews' Forms 267; Sands' Forms, 208.)

Articles of agreement entered into this _____ day of _____, in the year of our Lord 192—, between C. C. of the one part, and D. D. of the other part, both of the city of _____, in the State of _____: Witnesseth as follows, namely:

1. The said C. C. and D. D. agree to become co-partners together in the art or trade of painting, and all things thereto belonging, and also in buying, selling and retailing all sorts of wares, goods, and commodities, belonging to the said trade of painting; which said co-partnership is to continue for and during, and to the full end of the term of _____ years, from the date hereof next ensuing.

2. The said parties agree that each shall contribute as stock the sum of _____ dollars (the payment of which by both this day is hereby acknowledged), to be used, laid out and employed in common between them, for the management of the said trade of painting, to their utmost benefit and advantage.

3. The said co-partners shall not, nor will at any time hereafter, use, exercise or follow, the said trade of painting, or any other trade or employment whatsoever, during the said term, to their several and private benefit and advantage; but shall and will, at all times during the said term (if they shall so long live), each do his best and utmost endeavors, in and by all means possible, to the utmost of his skill and power, for their joint interest, profit and advantage; and truly employ, buy, sell and trade with the stock as aforesaid, and the increase thereof in the trade of painting aforesaid, without any sinister intention or fraudulent endeavors whatsoever.

4. The said co-partners shall and will, from time to time, and at all times hereafter, during the said term, pay, bear and discharge equally between them, the rent of the shop to be hired or rented for the conducting of the trade of painting aforesaid; and also shall and will defray, in equal proportions, from time to time, and at all times, all the expenses and charges of every kind attending the exercise of the said trade of painting.

5. The said co-partners shall, from time to time, during the said term, equally divide between them, share and share alike, all such gain, profit and increase as shall come, grow, arise, or accrue from or by reason of the said trade of joint business; and also, that all such losses as shall happen in the said joint trade by bad debts, ill commodities, or otherwise, without fraud or covin, shall be paid and borne equally and proportionably between them.

6. There shall be had and kept at all times during the said term, and joint business and co-partnership aforesaid, perfect, just and true books of accounts, wherein each of the said co-partners shall duly enter and set down, as well all money by him received, paid, expended and laid out in and about the management and business of the said trade, as also all wares, goods, commodities, and merchandise by them, or either of them, bought and sold or otherwise acquired and disposed of by reason or means, or upon account or in the business of the said co-partnership, and all other matters and things whatsoever to the said joint trade or business, and the management thereof, in any wise belonging or appertaining, which said books shall be used in common between the said co-partners, so that either of them may have free access thereto, without any interruption from or on the part of the other.

7. The said co-partners, once in ——— months, or oftener if either party shall require, upon the reasonable request of one of them, shall make, yield and render each to the other, or to the personal representatives of each other, a true, just and perfect account of all profits and increase, by them or either of them made, and of all losses by them or either of them sustained, and also of all payments, receipts, disbursements, and all other things whatsoever by them or either of them made, received, disbursed, acted, done or suffered, in and about the said co-partnership and joint business as aforesaid; and the same account so made, shall and will clear, adjust, pay and deliver each to the other, at the time of making such account their equal share of the profits so made as aforesaid.

8. And at the end of the said term of ——— years, or other sooner determination of the co-partnership aforesaid, by the death of one of the co-partners or otherwise, the said co-partners, each to the other, or in case of the death of either of them, the surviving party to the personal representatives of the party deceased, shall and will make and render a true, just, perfect and final account of all things as aforesaid, touching the said joint business and co-partnership, and divide the profits as aforesaid, and in all things well and truly adjust the same and the transactions thereof; and that upon the making and rendering of such final account, all and every the stock and stocks as well as the grains and increase thereof, which shall appear to be remaining, whether consisting of money, wares, debts, etc., shall be equally parted and divided between the said co-partners and their personal representatives, share and share alike; and,

9. It is agreed specially between the said co-partners, that no contract, guaranty, or transaction shall be entered into in the name or on behalf of the co-partnership, and the co-partnership name shall not

be affixed or placed to or on any writing whatsoever, unless such contract, guaranty, transaction, or writing shall directly concern and relate to the business and affairs of the said co-partnership.

Witness the hands and seals of the parties the day and year first above written.

C. C. [SEAL.]

D. D. [SEAL.]

No. 2. AGREEMENT FOR DISSOLUTION OF PARTNERSHIP

(Matthews' Forms, 270; Sands' Forms, 211.)

This indenture made this — day of —, in the year 192—, between A. G. of —, of the one part, and S. R. of —, of the other part: Whereas it was covenanted and agreed that the said A. G. and S. R. should become co-partners and joint traders together in the said art and trade of —, for the term of fourteen years from the — day of —, now next ensuing, upon a joint and equal capital to be made up between them, upon and subject to the terms and conditions in the said indenture particularly mentioned, as in and by the said indenture may be seen by reference being had thereto; and whereas the said A. G. and S. R. have mutually consented and agreed to dissolve the said co-partnership on the — day of —, next ensuing the date of these presents; and whereas all accounts relative to the receipts and disbursements on account of the said joint trade, and of all sums of money advanced and paid by the said parties, have been settled and adjusted up to the day of the date hereof; and whereas the said joint stock in trade hath been valued and appraised at the sum of — dollars; and whereas it also appears that there are due and owing to the said co-partnership, funds from sundry persons (the sum of — dollars), and that the said co-partnership stands indebted to sundry persons in the sum of — dollars. Now THIS INDENTURE WITNESSETH, that the said A. G. and S. R., in pursuance and performance of the said agreement, for themselves, their executors and administrators, have covenanted and agreed, and by these presents do covenant and agree to and with each other, their executors and administrators, that the said co-partnership trade, and all dealings and transactions relative thereto, shall, from the said — day of —, next ensuing the date of these presents, cease and determine; and that the said indenture of co-partnership, and every covenant, article, clause and agreement therein contained, as to the residue of the said term, shall from henceforth cease and determine and be absolutely void. And it is further covenanted and agreed, that the said S. R. shall collect, receive and get in all debts due and owing to the said co-partnership, and will, from time to time, as such debts shall be received and got in, pay and apply the same towards the discharge of all demands on the said co-partnership, and after such payment, shall and will, out of the surplus thereof, pay to the said A. G., therein and thereto, as the same shall be made and appear by the accounts of the said co-partnership. And for the better enabling the said S. R. to collect, receive and get in the debts due and owing to the said co-partnership, the said A.

G. doth hereby authorize and empower the said S. R. to ask, demand, sue for, levy, recover and receive the same, and to take all lawful ways and means to compel the payment thereof. And finally, the said parties hereto do mutually covenant and promise, the one unto the other of them, to sign, and cause to be inserted in the ———, printed and published in ———, and in such of the public newspapers as shall be deemed expedient, and as either of them shall require, due notice of the said dissolution of their said co-partnership, and such other notification thereof, by letter or otherwise, as may be found necessary.

In witness whereof, the said parties have hereunto set their hands and affixed their seals, on the day and year first herein written as the date hereof.

A. G. [SEAL.]

S. R. [SEAL.]

No. 3. NOTICE OF DISSOLUTION OF PARTNERSHIP, AND THAT ONE OF THE PARTNERS WILL CONTINUE THE BUSINESS

(Sands' Forms.)

Notice is hereby given that the partnership carried on by P. P. and C. P. under the name and style of ———, in ———, has this day been dissolved by mutual consent, and in future the business will be carried on by the said ———, on his separate account, who will pay and receive all debts due and owing to and from the said partnership in the regular course of business. This ——— day of ———, 192—.

P. P.

C. P.

No. 4. NOTICE OF DISSOLUTION OF PARTNERSHIP, AND WHO TO PAY, REQUESTING ACCOUNTS TO BE SENT IN

(Sands' Forms.)

Notice is hereby given that the partnership lately subsisting between P. P. and C. P., heretofore carrying on trade under the firm of ———, was, on the ——— day of ——— 192—, last, dissolved by mutual consent; all debts due and owing to the said partnership are to be received by the said ———, and all persons to whom the said partnership stands indebted are requested immediately to send in their respective accounts to said ———, in order that the same may be examined and paid. This day of ———, 192—.

P. P.

C. P.

No. 5. NOTICE OF DISSOLUTION OF PARTNERSHIP AS TO ONE OF THE PARTNERS, AND OF NEW FIRM

(Sands' Forms.)

Notice is hereby given that the partnership between P. P. and C. P., transacting business under the name and style of ———, was dissolved on the ——— day of ———, 192—, last, so far as it relates to the said C. P., and that all debts due to the said late partnership are

to be paid, and those due from the same, discharged at their house in _____, where the business will in future be continued by the said _____ and _____, and by _____, under the firm and style of _____.

Dated the _____ day of _____, 192—.

P. P.
C. P.
N. P.

PARTNERSHIP LIMITED, OR LIMITED PARTNERSHIP

(Acts 1918, pp. 364-72, §§ 1-31; Pocket Code 1920, p. 181; Pollard's Code Biennial 1920, p. 413. See also *Partnerships*, which by § 6 is made to apply to limited partnerships.)

- § 1. Limited partnership defined
- § 2. Formation
- § 3. Business which may be carried on
- § 4. Character of limited partner's contribution
- § 5. A name not to contain surname of limited partner; exceptions
- § 6. Liability for false statements in certificate
- § 7. Limited partner not liable to creditors
- § 8. Admission of additional limited partners
- § 9. Rights, powers and liabilities of a general partner
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- § 15. Compensation of limited partner
- § 16. Withdrawal or reduction of limited partner's contribution
- § 17. Liability of limited partner to partnership
- § 18. Nature of limited partner's interest in partnership
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- § 20. Effect of retirement, death or insanity of a general partner
- § 21. Death of limited partner
- § 22. Rights of creditors of limited partner
- § 23. Distribution of assets
- § 24. When certificates shall be cancelled or amended
- § 25. Requirements for amendment and for cancellation of certificate
- § 26. Parties to actions
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- § 29. Rules for cases not provided for in this act
- § 30. Provisions for existing limited partnerships
- § 31. Acts repealed
- § 31a. Form of certificate of limited partnership under § 2, above

Limited partnerships are a statutory substitute for some of the advantages of corporations, viz., the advantage of limited liability, etc.

The act below is a uniform act used in many states, and is so complete, concise, and important, the same is given in full.

§ 1. Limited partnership defined.—A limited partnership is a partnership formed by two or more persons under the provisions of section two, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

§ 2. Formation.—(1) Two or more persons desiring to form a limited partnership shall

(a) Sign and swear to a certificate which shall state

- I. The name of the partnership,
- II. The character of the business,
- III. The location of the principal place of business,
- IV. The name and place of residence of each member general and limited partners being respectively designated,
- V. The term for which the partnership is to exist,
- VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partnership to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(b) File for record the certificate in the clerk's office of the county or city in which a charter for the conduct of such business would be required to be recorded,

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1).

§ 3. Business which may be carried on.—A limited partnership may carry on any business which a partnership without limited partners may carry on.

§ 4. Character of limited partner's contribution.—The contributions of a limited partner may be cash or other property, but not services.

§ 5. A name not to contain surname of limited partner; exceptions.—(1) The surname of a limited partner shall not appear in the partnership name, unless

(a) It is also the surname of a general partner, or

(b) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner.

§ 6. Liability for false statements in certificate.—If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false.

(a) At the time he signed the certificate, or

(b) Subsequently, but within a sufficient time before the

statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in section twenty-five (3).

§ 7. Limited partner not liable to creditors.—A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.

§ 8. Admission of additional limited partners.—After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of section twenty-five.

§ 9. Rights, powers and liabilities of a general partner.—(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all the general partners have no authority to

- (a) Do any act in contravention of the certificate,
- (b) Do any act which would make it impossible to carry on the ordinary business of the partnership,
- (c) Confess a judgment against the partnership,
- (d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,
- (e) Admit a person as a general partner,
- (f) Admit a person as a limited partner, unless the right so to do is given in the certificate,
- (g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

§ 10. Rights of a limited partner.—A limited partner shall have the same rights as a general partner to

- (a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,
- (b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

(c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in sections fifteen and sixteen.

§ 11. Status of person erroneously believing himself a limited partner.—A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

§ 12. One person both general and limited partner.—

(1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner.

§ 13. Loans and other business transactions with limited partner.—(1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a *pro rata* share of the assets. No limited partner shall in respect to any such claim

(a) Receive or hold as collateral security any partnership property, or

(b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(2) The receiving of collateral security, or a payment,

conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership.

§ 14. Relation of limited partners inter se.—Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing.

§ 15. Compensation of limited partner.—A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners.

§ 16. Withdrawal or reduction of limited partner's contribution.—(1) A limited partner shall not receive from a general partner or out of partnership any property any part of his contribution until

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and

(c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution.

(a) On the dissolution of a partnership, or

(b) When the date specified in the certificate for its return has arrived, or

(c) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

(3) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(4) A limited partner may have the partnership dissolved and its affairs wound up when

(a) He rightfully but unsuccessfully demands the return of his contribution, or

(b) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph (1a) and the limited partner would otherwise be entitled to the return of his contribution.

§ 17. Liability of limited partner to partnership.—(1) A limited partner is liable to the partnership

(a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(b) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

(2) A limited partner holds as trustee for the partnership

(a) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

(b) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

§ 18. Nature of limited partner's interest in partnership.—A limited partner's interest in the partnership is personal property.

§ 19. Assignment of limited partner's interest.—(1) A limited partner's interest is assignable.

(2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(5) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with section twenty-five.

(6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

(7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under sections six and seventeen.

§ 20. Effect of retirement, death or insanity of a general partner.—The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners.

(a) Under a right so to do stated in the certificate, or

(b) With the consent of all members.

§ 21. Death of limited partner.—(1) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate and such power as the deceased had to constitute his assignee a substituted limited partner.

(2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner.

§ 22. Rights of creditors of limited partner.—(1) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

(2) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.

(4) Nothing in this act shall be held to deprive a limited partner of his statutory exemption.

§ 23. Distribution of assets.—(1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners,

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(c) Those to limited partners in respect to the capital of their contributions,

(d) Those to general partners other than for capital and profits,

(e) Those to general partners in respect to profits,

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively in proportion to the respective amounts of such claims.

§ 24. When certificates shall be cancelled or amended.—

(1) The certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be such.

(2) A certificate shall be amended when

(a) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,

(b) A person is substituted as a limited partner,

(c) An additional limited partner is admitted,

(d) A person is admitted as a general partner,

(e) A general partner retires, dies or becomes insane, and the business is continued under section twenty,

(f) There is a change in the character of the business of the partnership,

(g) There is a false or erroneous statement in the certificate,

(h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,

(i) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or

(j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them.

§ 25. Requirements for amendment and for cancellation of certificate.—(1) The writing to amend a certificate shall

(a) Conform to the requirements of section two (1a) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

(b) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs (1) and (2) as a person who must execute the writing refuses to do so, may petition the court in whose clerk's office the certificate was recorded to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing to amend or cancel the certificate executed by a person who refuses to do so, it shall order the cancellation or amendment of the certificate to be recorded in the clerk's office, setting forth in its decree the terms of any such amendment.

(5) A certificate is amended or cancelled when there is filed for record in the office designated in section two (1) b

(a) A writing in accordance with the provisions of paragraph (1), or (2) of this section,

(b) A certified copy of the order of court in accordance with the provisions of paragraph (4) of this section.

(6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this act.

§ 26. Parties to actions.—A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership except where the object is to enforce a limited partner's right against or liability to the partnership.

§ 27. Name of act.—This act may be cited as the uniform limited partnership act.

§ 28. Rules of construction.—(1) The rule that statutes in derogation of the common law as to be strictly construed shall have no application to this act.

(2) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those States which enact it.

(3) This act shall not be so construed as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect.

§ 29. Rules for cases not provided for in this act.—In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

§ 30. Provisions for existing limited partnerships.—(1) A limited partnership or partnership association formed under any statute of this State prior to the adoption of this act, may become a limited partnership under this act by complying with the provisions of section two; provided the certificate sets forth

(a) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership or partnership association formed under any statute of this State prior to the adoption of this act, until or unless it becomes a limited partnership under this act, shall continue to be governed by the provisions of chapter one hundred and thirty-five of the Code, except that such partnership shall not be renewed unless so provided in the original agreement.

§ 31. ~~Acts repealed~~.—Except as affecting existing limited partnerships or partnership associations to the extent set forth in section thirty, chapter one hundred and thirty-five of the Code [of 1887] is hereby repealed. (Acts 1918, pp. 364-72, §§ 1-31.)

§ 31a. Form of certificate of limited partnership, under § 2, above.—

Certificate of the limited partnership of _____
This to certify that we do hereby associate ourselves to establish a limited partnership under and by virtue of an act of the General Assembly entitled an act to make uniform the law relating to limited partnerships, which became a law June 21, 1918, and acts amendatory thereof, for the purpose and under the partnership name hereinafter mentioned, and to that end we do by our certificate set forth as follows: [Here insert the 14 items of § 2, of the act, above.]

Given under our hands, this the _____ day of _____, 192—.

The above writing sworn to by _____ and _____, before me, O. S., a notary public (or other proper officer) for the county (or corporation) of _____, in the State of Virginia, this the _____ day of _____, 192—.

O. P., N. P. (or other proper officer).

Virginia, county (or corporation) of _____, to-wit:

I, a _____ in and for the said _____, in the said State do certify that _____ and _____, whose names are signed to the foregoing writing, bearing date on the _____ day of _____, 192—, have acknowledged the same before me in my county (or corporation) aforesaid.

My commission expires _____. Given under my hand, this the
_____ day of _____, 192—.

N. P., (or other proper officer.)

The statute does not say the certificate should be acknowledged, but as it is required to be recorded, it is probably necessary to have it acknowledged.

PATENTS

See Brands; Copyrights; Labels or Prints; Trade-Marks

- § 1. Definition
- § 2. What may be patented
 - (1) A new and useful "art" or process
 - (2) A new and useful "machine"
 - (3) A new and useful "manufacture" or product
 - (4) A new and useful "composition of matter"
 - (5) A new and useful "improvement"
 - (6) Meaning of "invented" or "discovered"
 - (7) The invention must be "new" and "useful"
 - (8) Abandonment
- § 3. Patents of "design"
- § 4. How patent obtained
- § 5. Caveat against another while invention is being completed
- § 6. Fees in patent cases
- § 7. Assignments of inventions and patents
- § 8. Infringement of patent rights

§ 1. **Definition.**—A patent is an exclusive right, granted by United States Government, for 17 years, to make and sell a new and useful invention or discovery.

§ 2. **What may be patented.**—By section 4886 of the U. S. Revised Statutes, as amended: "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

So the invention or discovery may be: (1) *A new and useful "art" or process.*—"Art" means process, which is "a mode of treatment of certain materials to produce a given result"; or "an act or series of acts performed on a subject-matter to be transformed to a different state"; as, printing, photography, telegraphy, etc.

(2) *A new and useful "machine".*—"Machine" means a combination of mechanical elements adapted to perform a mechanical function, including every mechanical device, or combination of mechanical powers and devices, to perform some function and to produce a certain effect or result. A machine has its own rule of action.

There are four classes of inventions of machines: (a) Where the invention embraces the entire machine; (b) where it embraces one or more of its elements only; (c) where it embraces both a new element and a new combination of elements previously known; and (d) where it embraces a new combination of old elements, producing a new result. One may invent an art or process, and another a machine for carrying on the process, or the same person may obtain patents for both.

(3) *A new and useful "manufacture" or product.*—"Manufacture" means product, including everything made by the art or industry of man, that is not a machine, a composition of matter, or a design; as, baskets, pottery, articles of clothing, nails, screws, etc.

(4) *A new and useful "composition of matter."*—This is a compound of two or more substances possessing a property or quality not possessed by them individually.

(5) *A new and useful "improvement."*—This is an addition of some useful thing, quality, or property to an art, machine, manufacture, or composition of matter. This is a large field of invention. Over one and a third millions of patents have been granted, and they are issuing at the rate of about 800 a week.

(6) *Meaning of "invented" or "discovered."*—These words mean the same, under the patent law, and have the idea of creating, the creation for the first time being an invention. The discovery of a principle or law of nature is not patentable. The process or thing must be the result of

the exercise of the inventive faculties, it matters not how small or easy or quick the effort or idea.

It is not an invention to produce a device any skilled mechanic could produce; or to change the form of a machine (unless a particular form is necessary to accomplish a particular effect), or some unessential parts, or in using known equivalent powers, not essentially varying the machine or its mode of operation or organization; or to change the location or position of parts (unless such change brings about a new combination of devices, operating to produce a new and useful result); or to substitute one material for another, unless it thereby produce a new mode of operation, or a result different, not merely in degree, but in kind; or where two devices are "mechanical equivalents," i. e., perform the same function in substantially the same way, with substantially the same result, as, a crank and an eccentric or cam, a weight and a spring, etc.; or to devise an "aggregation" of parts not contributing to a new mode of operation nor producing a new and common result, but if they thus result (even though the parts do not act simultaneously but successively), they are a "combination," and are patentable, as, a rubber on a lead pencil, the "stem-winder" of a watch, etc.

(7) *The invention must be "new" and "useful."*—The act of Congress (see section 2, above) says the invention must be "new and useful," and "not known or used by others," etc. So novelty and utility are necessary. "New" is broader than the dictionary or commercial meaning, and "novelty" is sometimes, though improperly used for "invention". By "useful" is meant, beneficial to society, as contradistinguished from injuries to good morals or the good order of society, or frivolous, or a mere contrivance without any other merit than novelty.

(8) *Abandonment.*—The act of Congress (see section 2, above) says the invention may be patented, if it has not been "in public use or on sale for more than two years prior to the application" or has not been "proved to have been abandoned", as where the inventor freely gives it to the public without intending to have it patented. (4 Am. Law & Prac., pp. 103-21.)

§ 3. *Patents of "designs."*—By section 4928 of the U.

S. Revised Statutes: "Any person, who by his own industry, genius, efforts, and expense, has invented or produced any new and original design for a manufacture, bust, statute, alto-relievo, or bas-relief; any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may upon payment of the fee prescribed by law, and other due proceedings had the same as in cases of inventions or discoveries, obtain a patent therefor."

Patents for designs may be granted for the term of $3\frac{1}{2}$ or for 7 years, or for 14 years, as the applicant may in his application elect.

The fee for a design patent for $3\frac{1}{2}$ years is \$10; for 7 years, \$15; and for 14 years, \$30, payable in each case when the application is filed. In all other cases in which fees are required the same rates are charged as in the case of patents for inventions or discoveries.

The proceedings on applications for patents for designs are substantially the same as in those for inventions or discoveries. The specifications must distinctly point out the characteristic features of the design and carefully distinguish between what is old and what is claimed to be new. When the design can be sufficiently represented by drawings or photographs no model will be required. When a photograph or engraving is employed for this purpose, it must be mounted on bristol board 10 by 15 inches in size, and properly signed and witnessed. The applicant will be required to furnish ten extra copies of such photograph or engraving (not mounted) of a size not exceeding $7\frac{1}{2}$ inches by 11. Whenever the design is represented by a drawing made to conform to the rules laid down for drawings of mechanical inventions, but one copy need be furnished.

§ 4. How patent obtained.—First, write to the Commissioner of Patents, Washington, D. C., for a copy of the

Rules of Practice, containing forms and instructions for applying for a patent. A skillful and experienced patent attorney or solicitor in Washington should be employed, though patents can be obtained without any attorney. The steps in obtaining a patent are as follows:

Before a patent is issued, the applicant is required to file in the Patent Office a written application or petition, addressed to the Commissioner of Patents, which shall contain a description of his invention or discovery, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected, to make, construct, compound, and use it, and in case of a machine, he is required to explain the principle of it and the best mode in which he has contemplated applying that principle so as to distinguish it from other inventions; and he must particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. This specification and claim must be signed by the inventor and by at least two witnesses, and, if need be, illustrated by drawings, specimens and models. The applicant must make oath that he believes himself to be the original inventor or discoverer; that he does not know or believe that the same was ever before known or used, and of what country he is a citizen. On the filing of any such application and the payment of the fees required by law, the Commissioner of Patents shall cause an examination to be made of the alleged new invention or discovery, and if it shall appear that the claimant is, under the law, entitled to a patent, and that the invention or discovery is sufficiently useful and important, the commissioner shall issue, under the seal of the Patent Office, and in the name of the United States, Letters Patent therefor, signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents.

If an inventor or discoverer dies before a patent is granted, his personal representative may obtain it in trust for his heirs at law or his devisees.

If, on examination, a claim for a patent is rejected, the commissioner is required to notify the applicant thereof, with

a brief statement of the reasons for such rejection; and if the applicant persists in his claim, with or without altering his specifications, the commissioner shall order a re-examination. And if a claim has been twice rejected, the applicant may appeal from the decision of the primary examiner to the board of examiners in chief; and from the decision of that board to the commissioner in person; and from the decision of the commissioner to the Supreme Court of the District of Columbia, sitting *in banc* (in full court), making the commissioner a party. Nay, yet further, whenever a patent on application is refused by the commissioner, or by the Supreme Court of the District of Columbia upon appeal from the commissioner, the applicant may still have remedy by bill in equity, summoning the adverse parties; or if there be no opposing party, serving a copy of the bill upon the commissioner.

Patentees and their assignees are required to give sufficient notice to the public of their patent right, either by affixing thereon the word "patented," together with the day and year the patent was granted, or in some equivalent way, according to the nature of the article; and if this be omitted no damages can be recovered for infringement, except on proof of actual notice. (3 Min. Inst., pp. 54, 55.)

§ 5. Caveat against another, while invention is being completed.—Any person making a new invention or discovery and desiring further time to mature it may upon paying the proper fees file a caveat in the patent office which will be considered confidential by the patent officers, and will have the effect of preventing the issuing of a patent on the like invention and discovery to any other person without notice to him but it will be operative for one year only. Any interfering application that may be filed will also be deposited in the confidential archives of the patent office. If a claim for a patent is rejected the claimant will be notified and have an opportunity to alter his specification or renew his application.

§ 6. Fees in patent cases.—Nearly all the fees payable to the Patent Office are positively required by law to be paid in advance.

The following is the tariff of fees established by law:

On filing application for design patent, 3½ years,	\$10.00
On filing application for design patent, 7 years,	15.00
On filing application for design patent, 14 years,	30.00
On filing a caveat,	10.00
On filing an application for a patent for an invention, ..	15.00
On issuing each original patent for an invention,	20.00
On filing an appeal from a primary examiner to examiners-in-chief,	10.00
On filing an appeal to the Commissioner from examiners-in-chief	20.00
On every copy of a patent or other instrument, except copies of printed patents, for every 100 words,10
On every copy of drawing, the cost of having it made.	
For recording every assignment of 300 words or under..	1.00
For recording every assignment, if over 300 and not over 1,000 words,	2.00
For recording every assignment, if over 1,000 words, .	3.00

§ 7. Assignments of inventions and patents.—Patents may be granted and issued or reissued to the assignee of the inventor or discoverer, but the assignment must first be recorded in the Patent Office. And in all cases of applications for the issuance of patents to the assignee the application must be made and the specifications sworn to by the inventor or discoverer; and in all cases of applications for the reissue of a patent the application for the reissue and the corrected specifications must be signed by the inventor or discoverer, if he be living.

Every patent and every interest in a patent may be assigned and transferred like any other right or interest, and the person owning a patent or an interest in one may grant to others the right to use the patented article within a certain territory. This right may be granted either during the entire term of the patent, or it may be for a shorter time. But any assignment of a patent, or any interest in one, or right under it, which is not recorded in the Patent Office, is void as against any other purchaser for value of the patent, interest, or right represented by the assignment, provided that the purchaser did not know of the previous assignment and bought in good faith, paying a valuable consideration for it.

The requirement of the law to record assignments of patents does not apply where the paper is merely a license to manufacture, use, or sell the thing patented, in conjunction with the patentee. If the paper does not divest the patentee entirely of the right to manufacture, use, or sell the patented thing within the territory mentioned or for the time specified, it need not be recorded. Such a paper is a mere license and does not confer upon or grant to the person to whom it is given "an interest in the patent." Where it is required to record any instrument or transfer in the Patent Office, such record must be made within three months after the date of the instrument.

§ 8. Infringement of patent rights.—The remedies are action for damages, or suit in equity for injunction and damages, in the U. S. circuit court. In an action for infringement, the defendant may, after giving 30 days' notice, prove on the trial any one or more of the following special matters:

(1) That for the purpose of deceiving the public, the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or

(2) That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting or perfecting the same; or

(3) That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or

(4) That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or

(5) That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

And if any one or more of the special matters alleged be found for the defendant, judgment shall be rendered for him with costs.

And the like defenses may be pleaded in any suit in

equity for relief against an alleged infringement; and proof of the same may be given upon like notice, in the answer of the defendant, and with the like effect.

In case of a finding for the plaintiff, the court (at law or in equity) may award him, according to circumstances, any sum above the actual damages found, not exceeding three times those damages.

As to infringement, the criterion is substantial identity of construction or operation. Mere changes of form, proportion, or position or substitution of mechanical equivalents will be infringements unless they involve a substantial difference of construction, operation or effect. Generally incorporating into a new structure the substance of an invention is infringement. If a patent is for a new combination of machines to produce certain effects it is not infringement to use any of the machines separately, but it is an infringement to use one of several distinct improvements claimed or to use a substantial part of an invention though with some modification or improvement of form or apparatus.

Even though two machines perform the same function one will not be an infringement upon the other where the practical result is attained by a different mechanical structure and mechanical action, but a patentee may treat as infringers all who make a similar device operating on the same principle and performing the same functions by analogous means or equivalent combinations, although the infringing machine may be an improvement of the original and patentable as such. If, however, the invention claimed is itself but an improvement on a known machine by a mere change of form or combination of parts it will not be an infringement to improve the original machine by the use of a different form or combination of parts performing the same functions provided the latter improvements are not mere colorable invasions of the former.

Making a patented machine for philosophical experiment and not for use or sale is not infringement, but a use with a view to experimenting to test its value is. Sale of the articles produced by the patented machine or process is not an infringement nor is the *bona fide* purchase of the patented articles from an infringing manufacturer. Ignorance

of existence of the patent by the infringer furnishes no defence but may mitigate damages.

PAYMENT

See Application of Payments; Compromise; Novation of Debts; Set-Off; Tender.

In an action or warrant to recover a debt, the defendant may plead payment before action brought. He may pay money into court to the clerk and plead that he does not owe him; the plaintiff may accept the sum in full satisfaction, and have judgment for his costs, or in part satisfaction, and go to trial, but if judgment is for the defendant he recovers his costs. (Code, §§ 6141-3.)

Payment involves two elements, tender of the amount due and its acceptance by the creditor. It can only be made by one who or whose property is in some way liable for the debt, and must be made to the creditor or his agent. One cannot make himself the creditor of another by voluntarily paying his debt without his request or ratification; but the same result may be accomplished indirectly by taking an assignment of the debt or an agreement therefor—see *Assignments*. A sheriff with an execution in hands, may pay a debtor's debt and hold him liable though without his consent, ratification, or taking any assignment. A stranger paying without assignment loses all securities for the debt.

A bond, note, check, draft, or other bill of exchange, unless otherwise agreed, is a conditional payment only.

A mere payment under protest and notice of intention to sue to recover the money back is unavailing, unless the compulsion was illegal, unjust or oppressive; and usually the payment must have been made to emancipate one's personal property from an illegal duress, or to prevent a seizure by one with apparent authority to do so (113 Va. 145). (Burks' Pl. & Pr., § 228.)

PENALTY

- § 1. Definition
- § 2. Difference in penalty and "liquidated damages"
- § 3. How judgment entered where there is a penalty

§ 1. **Definition.**—A penalty is the larger amount (usually double) which an obligor agrees to pay if he fails to pay a smaller sum or to do something else.

§ 2. **Difference in penalty and "liquidated damages."**—"Liquidated damages" are those decided upon in advance by agreement between the parties. Such a stipulation is binding; but a penalty may be discharged by paying the actual amount due (see section 3, below). The sum named in an agreement will be held to be liquidated damages or a penalty according to the intent of the parties, to be gathered by the court from the agreement. The penal sum in a bond is usually a penalty. In other cases, the mere use of the word "penalty" or "liquidated damages" is not decisive of the question, if a different intent appears from the whole agreement. A stipulation in an agreement will be considered as a penalty in the following cases: (1) Where expressly so declared and no other intent clearly appears; (2) where it is doubtful which it is (109 Va. 230); (3) where the stipulation is wholly collateral or aside from the main object of the agreement; (4) where the same sum is named for breaches of duties or obligations of different degrees of importance (108 Va. 230); (5) where the agreement is not under seal and the damages can be certainly known and estimated; (6) where a larger sum is to be paid upon default in paying a smaller sum in a manner prescribed; (7) where the payment is of a debt or liquidated money demand, and the sum fixed upon is greater; (8) where the sum named is evidently intended to evade the usury laws or statutory prohibitions.

A stipulation will be construed liquidated damages: (1) Where the damages are uncertain and not capable of being ascertained by any satisfactory and known rule; (2) where a deposit by way of part performance is made of a sum to be forfeited in case of default; (3) where a sum is named for default in a contract not to carry on a certain business within a specified time or territory; (4) where a forfeiture of percentages are provided for in government or building

contracts, or where daily reasonable amounts are to be paid upon failure to complete a work; (5) or generally, where from the tenor of the agreement and the nature of the case, it appears the parties have ascertained the damages by fair calculation and adjustment. (2 Bouvier's Law Dict., *Liquidated Damages*.)

A stipulation in a negotiable note for the payment of a reasonable attorney's fee, if suit be brought, is not a penalty or usury, but is valid and may be enforced (119 Va. 439, overruling 89 Va. 113 and 105 Va. 714).

By section 5564 of the Code, provision for the costs of collection or an attorney's fee may now be inserted in a negotiable note.

§ 3. How judgment entered where there is a penalty.— In the case of a penal bond for the payment of money, the judgment is for the penalty to be discharged by paying the principal and interest due thereon; and in any other case of a penalty, the judgment is for the penalty to be discharged by the damages ascertained by the jury. (Code, §§ 6201-2.)

PENITENTIARY

See Convicts.

For organization, government and discipline of the penitentiary, see Code, §§ 4993-5048, and Acts 1918, p. 474, affecting §§ 4993. 5016-17, 5045, and p. 457, affecting § 5008; also Acts 1920, p. 394.

PENSIONS

See Code, §§ 2642-72, as amended by Acts 1918, p. 143.

PERJURY

I. THE STATUTES

- § 1. What deemed perjury
- § 2. Perjury and subornation of perjury; how punished
- § 3. What sufficient statement in indictment for perjury

II. OBSERVATIONS UPON THE STATUTE

- § 4. Perjury at common law
- § 5. The oath must be taken before competent authority
- § 6. The oath must be wilful
- § 7. The oath must be false
- § 8. The thing sworn to must be material
- § 9. Proof necessary to convict of perjury
- § 10. Form of "description" in warrant or indictment

I. THE STATUTES

§ 1. **What deemed perjury.**—"If any person, to whom an oath is lawfully administered on any occasion, wilfully swear falsely on such occasion touching any material matter or thing, or if a person falsely make oath that any other person is twenty-one years of age, in order to obtain a marriage license for such other person, he shall be guilty of perjury." (Code, § 4493.)

§ 2. **Perjury and subornation of perjury; how punished.**—"If any person commit or procure another person to commit perjury, he shall be confined in the penitentiary not less than one nor more than ten years; or, in the discretion of the jury, be confined in jail not exceeding one year, or fined not exceeding one thousand dollars, or both." (Code, § 4494.)

"He shall, moreover, on conviction thereof, be adjudged forever incapable of holding office, or of serving as a juror" (Code, § 4495).

§ 3. **What sufficient statement in indictment for perjury or subornation of perjury.**—"In an indictment or accusation for perjury or subornation of perjury, it shall be sufficient to state the substance of the offense charged against the accused, in what court or by whom the oath was administered which is charged to have been falsely taken, and to aver that such court or person had competent authority to administer the same, together with proper averments to falsify the matter wherein the perjury is assigned, without setting

forth any part of any record or proceeding at law or equity, or the commission or authority of the court or person before whom the perjury was committed; but nothing herein shall be construed to allow, without the consent of the accused, a part only of any record, proceeding, or writing to be given in evidence on the trial of such indictment or accusation. A distinct allegation, averment, or statement in any part of the indictment that the defendant did corruptly swear falsely, or did, on the occasion of such estate, was in the person or community alleged in the indictment or other accusation to be the owner thereof." (Code, § 4869.)

II. OBSERVATIONS UPON THE STATUTE

§ 4. Perjury at common law.—Perjury at common law is where a person, who is lawfully required to depose the truth in any proceeding in a court of justice, makes, on oath, a wilful false statement in a matter of some consequence to the point in question, whether he be believed or not. Subornation of perjury is the procuring another to take such a false oath as constitutes perjury in the principal. And even the bare solicitation to swear falsely, although it does not amount to subornation of perjury, is an independent misdemeanor at common law.

Perjury and subornation of perjury are misdemeanors at common law, punishable in modern times by fine and imprisonment, but anciently with far greater severity—even with death, it seems.

With the exception that at common law the oath must be taken in a judicial proceeding, while by statute it may be taken "on any occasion," when lawfully administered, the ingredients of the offense are the same under the statute as at common law. (H's G. & M., p. 231.) So that to constitute this offense four things are necessary, as follows:

§ 5. The oath must be taken before competent authority.—It must be taken before such an officer or tribunal as may lawfully administer that particular oath; for if it be taken before one who may legally administer some kinds of oaths, but not the particular oath in question, it cannot be perjury. Nor can it be perjury where the oath is taken before one acting merely in a private capacity; or before one who undertakes, without authority, to administer oaths of a

public nature; or before one acting under mere colorable authority. (H's G. & M., p. 232.)

§ 6. The oath must be wilful.—That is, the alleged perjury must be accompanied by some degree of deliberation; must not be owing to weakness, but to perverseness; and not to surprise, inadvertence, or mistake, but to design. And a wilful false statement of a witness' belief, opinion, remembrance, or the like, is as much perjury as such a statement as to a fact. (H's G. & M., p. 232.)

§ 7. The oath must be false.—But it is immaterial whether the fact sworn to be in itself true or false, if the defendant did not know it to be true, or had not probable cause, according to his own lights, to believe it to be true. (H's G. & M., p. 232.)

§ 8. The thing sworn to must be material.—That is, it must be matter in some way pertinent to the point in question, as tending to aggravate or extenuate damages or guilt, or to induce a readier credence of the substantial parts of the testimony. If the false oath has any tendency, however slight, to prove or disprove the point at issue, it is sufficient; but whether material or not depends, of course, upon all the circumstances connected with the examination. (H's G. & M., p. 232.)

§ 9. Proof necessary to convict of perjury.—To prove the falsity of the statement alleged to be untrue, there must be two witnesses, or one and strong corroborating circumstances; or circumstances alone, when they exist in documentary or written testimony. And while two contradictory oaths of the prisoner is not sufficient to convict him, yet where this is the case, less evidence, or even that of one witness, it seems, may turn the scale against him.

To prove the taking of the oath or the fact sworn to, one witness is sufficient. (H's G. & M., p. 233.)

§ 10. Form of "description" in warrant or indictment.—

No. 1. PERJURY COMMITTED ON THE TRIAL OF AN OFFENSE

(Code, §§ 4493-5, 4869.)

DESCRIPTION:

"being duly sworn by the circuit court (or by *J. R., a justice*) of said county to testify and the truth to speak on behalf of the Commonwealth on the trial before the said court, at its ——— term,

192— (or *before the said justice*), of G. H. for [here state the offense for which he was tried], the said court (or *justice*) then and there having competent authority to administer the said oath, did then and there, upon his oath aforesaid, and touching a matter then and there material to be inquired into, feloniously, wilfully and corruptly swear, depose, and testify, among other things, that [here state the substance of what he swore to]; whereby the said C. D. did then and there, in the manner and form aforesaid, feloniously, wilfully, and corruptly swear falsely, and thereby feloniously commit wilful and corrupt perjury."

NO. 2. SUBORNATION OF PERJURY ON A TRIAL FOR FELONY

(*Idem.*)

DESCRIPTION:

"A. B., being then and there duly sworn by the circuit court (or *J. R., a justice*) to testify and the truth to speak as a witness on behalf of the Commonwealth, on the trial, before the said court, at its ——— term, 192— (or *before the said justice*), of the said C. D. for feloniously [here state the felony for which he was tried], the said court (or *justice*) then and there having competent authority to administer the said oath, did then and there, by sinister and unlawful means and persuasion, feloniously suborn and procure the said A. B., upon his oath aforesaid, and touching a matter then and there material to be inquired into, falsely, wilfully and corruptly to swear, depose and testify, among other things, that [here state the substance of what he swore to]; whereas in truth and in fact [here negative what he swore to]; whereby the said C. D. did then and there feloniously, wilfully, and corruptly commit subornation of perjury, by procuring the said A. B. to commit wilful and corrupt perjury in and by his oath aforesaid."

NO. 3. PERJURY COMMITTED ON THE TRIAL OF A CIVIL CAUSE.

(*Idem.*)

DESCRIPTION:

"being duly sworn by the circuit court (or *by J. R., a justice*) of said county, to testify and the truth to speak as a witness on behalf of G. A., on the trial before the said court, at its ——— term, 192— (or *before the said justice*), of a certain case then and there pending, wherein G. H. was plaintiff and K. L. was defendant, the said court (or *justice*) then and there having competent authority to administer the said oath, did then and there, upon his oath aforesaid, and touching a matter then and there material to be inquired into, feloniously, wilfully and corruptly swear, depose and testify, among other things, that [here state the substance of what he swore to]; whereas in truth and fact [here negative what he swore to]; whereby the said C. D. did then and there, in the manner and form aforesaid, feloni-

ously, wilfully, and corruptly swear falsely, and thereby feloniously commit wilfully and corrupt perjury.]”

PETITIONS (FORMS OF)

No. 1. PETITION TO CONGRESS, LEGISLATURE, PRESIDENT, GOVERNOR, OR CITY OR TOWN AUTHORITIES.

To the Honorable the Senate and House of Representatives of the United States of America in Congress Assembled:

The petition of the subscribers, citizens of ———, in the state of ———, respectfully sheweth: (here state the subject-matter petitioned for). And your petitioners will ever pray, etc.

In case of the Legislature, address as follows:

“To the Honorable, the Senate and House of Delegates of the State of Virginia, in General Assembly met.”

In case of the President or Governor:

To His Excellency, ———, President of the United States of America” (or “Governor of the State of Virginia”).

In case of a city or town:

“To the Honorable, the Mayor, Board of Aldermen, and Common Council (or “the Mayor and Council,” in case of a town).

No. 2. PETITION TO COURT OR BILL IN CHANCERY.

To the Hon. J. J., Judge of the Circuit Court of ——— County:

Your petitioner (or *orator*), A. B. (on “A. B., an infant under the age of twenty-one years, who sues by N. F., his next friend;” or “A. B., who sues for himself and such others, the creditors of D. D., deceased (or *the Hon creditors of D. D.*), who shall come in, take part in, and share the costs of, this suit;” or “A. B., the committee of L. L., a lunatic;” or “A. B., he being a lunatic;” and no committee being appointed for him, suing by N. F., his next friend;” or “A. B., guardian of I. F., an infant under the age of twenty-one years;” or “A. B., suing for himself and the other creditors of D. D., secured in a certain deed of trust dated the ——— day of ———, 192—,”) humbly complaining, sheweth unto your honor, that [here set out a concise and orderly statement of the facts upon which the suit or proceeding is based].

Forasmuch, therefore, as these doings are contrary to equity and good conscience, and as your orator is remediless, save in court of chancery, where matters of this sort are properly cognizable, your orator prays that the said O. P., P. R., and R. S., may be made parties defendants and required to answer the same, but an answer under

oath is hereby expressly waived (or "required to answer the same under oath as fully and particularly as if each of them had been thereto specifically interrogated, and particularly that the said O. P. may say whether"—setting out the specific interrogatories); and that a guardian *ad litem* may be appointed for the infant defendant, R. S. And your orator further prays that (here set out the special relief desired). And that such other, further, and general relief may be granted to your orator as is adapted to the nature of his case, and agreeable to equity and good conscience. And your orator will ever pray, etc. A. B.

A. T., p. q.

A married woman may now sue or be sued, as if she were unmarried (Code, § 5134).

For various forms of petitions or bills in chancery, in different cases, see Hurst's Forms, Nos. 70 to 106.

PHYSICIANS, SURGEONS, AND DENTISTS

See Health.

- § 1. Liability for malpractice.
- § 2. Liability of patient for service.
- § 3. License

§ 1. **Liability for malpractice.**—When a physician, surgeon, or dentist treats a case, in contemplation of law he undertakes to bring to that treatment what is termed reasonable or ordinary care, skill and diligence, and if injury results to his patient by reason of want of such care, skill or diligence in the use of the method of treatment employed by him, whether with the use of the knife, electric battery, radium, X-ray, anti-toxin, or other means or medicine, he is liable for damages, though he is not an insurer of results unless he expressly and absolutely contract therefor.

To render him liable, however, the two conditions must exist, viz.: that there must be lack of ordinary care, skill or diligence and it must appear that the injury resulted therefrom. It must appear also that his default is the proximate, not the remote, cause of the injury, and mere ignorance of the case will not render him liable if his treatment be correct. The medical man is not required to possess or exercise the skill

which some other specially skillful physician or surgeon might have exercised. It is sufficient if he show that his treatment was in accordance with the usual and ordinary treatment practiced by competent physicians or surgeons in such cases. The law, however, frowns upon quackery.

A physician stating to one who applies to him for professional aid that his method of treatment will cure the ailment, he, at the time not having a belief either that it would or would not, is liable for injuries resulting from the treatment. Though one lack ordinary skill, yet if he inform the patient thereof, and the patient yet employs him he can not complain of consequent evil results. Refusing the assistance of other medical men will neither increase nor diminish a physician's or surgeon's obligation.

One rendering services gratuitously it may be said is liable for injury resulting, not from ordinary negligence, but gross negligence only. It has been said also that a physician whose practice is limited to the country or a sparsely settled district will not be held to the same degree of skill in surgical cases one residing in a city where he is supposed to have been under much larger experience and practice in surgery.

A physician, surgeon, or dentist is not liable for any error of judgment unless so gross as to be inconsistent with reasonable care, skill and diligence. Cases are often obscure in their character, and it is sometimes impossible to know with certainty the nature, cause or attributes of physical disorders, and no one can be held to have absolute knowledge with regard to many cases which he is called upon to treat. Having once undertaken to treat or care for a patient the physician is obliged to continue to do so until he is discharged, or until at least a reasonable time be given to procure other attendance, or until the patient has so far recovered that the services of a physician or surgeon are no longer needed or useful.

The law does not recognize "schools" in the practice of medicine, and will merely require the practitioner to exercise the ordinary and usual skill in administering the treatment commonly approved by the school to which he belongs, whether allopathic or homeopathic or otherwise. The patient

is bound to follow the instructions of his physician and if he do not or if injuries arise through negligence on his part he can not recover, nor can he recover even though the physician or surgeon was negligent or unskilled in his treatment if his own negligence contributed to or assisted in bringing about the injury.

One treating physical or mental ailment by the process known as Christian science for compensation or expected gratuity, is within the prohibitions and liable to penalties imposed upon one practicing medicine without having complied with the legal requirements as to registration, etc.

The burden of proving malpractice is upon the plaintiff. It is said that where a professional man is on trial before a jury of laymen the court is in duty bound to protect him against prejudices likely to arise in such case. If malpractice be once established by the evidence, the jury, in fixing damages, may consider the pain and suffering and inconvenience resulting therefrom, the loss of earning power occasioned to the plaintiff, and whether it be temporary or permanent and the expenses incurred by reason of the negligent or improper treatment. Their aim should be so far as is possible to fix an actual money value upon the injury inflicted. (Hawkins' Legal Counselor, p. 504.)

§ 2. Liability of patient for service.—The implied contract of the physician, surgeon, or dentist, is either with the patient himself or the person bound under the law to furnish him or her with necessities, such as the husband of a married woman, father of a child, guardian of a ward and the like. Where the services are rendered to one person at the special instance and request of a third party and upon the credit of the third party there may be an implied contract on his part to pay even though there be no express promise to do so.

The physician himself is the proper judge as to the necessity of frequent visits, and the presumption is that all visits made are necessary, though this presumption may be overcome by competent evidence to the contrary. It has even been said that a physician in charging for his services may consider the patient's ability to pay and is not bound to charge all alike. He may also, as bearing upon the value of

his services, prove his professional standing to be high. It would appear however that if there is a fixed price in a neighborhood for attendance in particular kinds of cases, which the physician is known to have adhered to, this price will control where there is no express contract fixing a different one. Where the law requires the physician to be licensed and imposes a penalty for practicing without a license, he can not recover for services rendered or medicines furnished unless licensed. If it appear that the treatment rendered by a physician was clearly improper or that reasonable or ordinary skill, care and diligence were not exercised, this will be a good defense in a suit to recover for services.

In a suit by a physician for his services the defendant can not as a defense prove general low professional character or standing of the physician. Physicians may recover for services of their students in attendance upon their patients. If a physician carries a contagious disease into a family without informing them of the danger and without their knowing it on a suit for services this may be shown to reduce the claim. (Hawkins' Legal Counselor, p. 505.)

§ 3. *License*.—See *Health*; and *Licenses and License Taxes*, sections 49 and 50.

See *Health*; and *Licenses and License Taxes*, sections 49 and 50.

PICTURE OR NAME (UNLAWFUL USE OF).

The unlawful use of another's name, portrait, or picture, whether living or dead, for advertising purposes, or for the purposes of trade, without consent first obtained, is both a misdemeanor punishable by a fine of \$50 to \$1,000, and a civil injury which may be enjoined and compensated for by damages—exemplary or punitive damages, if the use be wilful. (Code, § 5782.)

PITS OR WELL-HOLES.

For act requiring well-holes or pits to be filled, when not in use, see Acts 1922, p. —.

PLEADING AND ITS INCIDENTS

See *Criminal Law and Procedure; Payment; and Set-Off.*

§ 1. Different parts or steps in pleading

- (1) Declaration
- (2) Defense in general
- (3) Demurrer
- (4) Dilatory pleas in general
- (5) Plea to the jurisdiction
- (6) Plea in suspension of the action
- (7) Pleas in abatement
- (8) Peremptory pleas
- (9) Bankruptcy
- (10) Tender
- (11) Replication, rejoinder, sur-rejoinder, rebutter, and sur-rebutter
- (12) Issue

§ 2. Various rules of common law pleading

§ 3. Equity pleading and procedure

- (1) Bill of complaint
- (2) Demurrer
- (3) Pleas
- (4) Disclaimer
- (5) Answer
- (6) Replication
- (7) Settlement of accounts
- (8) Decree
- (9) Re-hearings and bills of review
- (10) Appeal

§ 4. Statutory provisions as to pleading

§ 5. Various forms of pleas.

§ 1. Different parts or steps in pleading:

- (1) *Declaration*.—See 4 Min. Inst. 683 & seq.
- (2) *Defense in general*.—See 4 Min. Inst. 737 & seq.
- (3) *Demurrer*.—See 4 Min. Inst. 744 & seq.; Burks' Pl. & Pr. § 200 & seq.

- (4) *Dilatory pleas in general*.—See 4 Min. Inst. 750 & seq.
- (5) *Plea to the jurisdiction*.—See 4 Min. Inst. 751.
- (6) *Plea in suspension of the action*.—See 4 Min. Inst. 752.
- (7) *Pleas in Abatement*.—See 4 Min. Inst. 753 & seq.
- (8) *Peremptory pleas*.—See 4 Min. Inst. 761 & seq.; Burks' Pl. & Pr., §§ 197-9.
- (9) *Bankruptcy*.—See Burks' Pl. & Pr., §§ 209-11.
- (10) *Tender*.—See Burks' Pl. & Pr., §§ 212-15.
- (11) *Replication, rejoinder, sur-rejoinder, rebutter, and sur-rebutter*.—802 & seq.
- (12) *Issue*.—See 4 Min. Inst. 807.

§ 2. Various rules of common law pleading.—There are certain recognized general rules of pleading, which we can only name here; without giving the subordinate rules under them, or elucidating any, that not being within the scope of this work, which does not cover pleading:

I. After the declaration the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance.

II. Upon a traverse issued must be tendered.

III. Issue, when well tendered, must be accepted.

IV. All pleading must contain matter pertinent and material.

V. Pleadings must not be double.

VI. It is not allowable both to plead and to demur to the same matter.

VII. The pleadings must have certainty of place and time.

VIII. The pleadings must specify quality, quantity, and value.

IX. The pleadings must specify the names of persons.

X. The pleadings must show authority.

XI. In general whatever is alleged in pleading must be alleged with certainty.

XII. Pleadings must not be insensible nor repugnant.

XIII. Pleadings must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading.

XIV. Pleadings must not be argumentative.

XV. Pleadings must not be in the alternative.

XVI. Pleadings must not be by way of recital, but must be positive in their form.

XVII. Things are to be pleaded according to their legal effect or operation.

XVIII. Pleadings should observe the known and ancient forms of expression, as contained in approved precedents.

XIX. Pleadings should have their proper formal commencement and conclusions.

XX. A pleading which is bad in part is bad altogether.

XXI. There must be no departure in pleading.

XXII. Where a plea amounts to the general issue, it should be so pleaded.

XXIII. Surplusage is to be avoided.

XXIV. The declaration must be conformable to the original writ.

XXV. The declaration should have its proper commencement, and should in conclusion lay damages, and allege production of suit.

XXVI. Pleas must be pleaded in due order.

XXVII. Pleas in abatement must give the plaintiff writ or declaration.

XXVIII. Dilatory pleas must be pleaded at a preliminary stage of the suit.

XXIX. All affirmative pleadings which do not conclude to the country, must conclude with a verification.

XXX. In all pleadings where a deed is alleged, under which the party claims or justifies, purport of such deed must be made.

XXXI. All pleadings must be properly entitled.

XXXII. All pleadings ought to be true. For a discussion of these rules, and pleading in general, see 4 Min. Inst. 1102-1307; and Burks' Pl. & Pr., §§ 427-516.

§ 3. Equity pleading and procedure.—

(1) *Bill of complaint*.—See 4 Min. Inst. 1351 & seq.

(2) *Demurrer*.—See 4 Min. Inst. 1393 & seq.

(3) *Pleas*.—See 4 Min. Inst. 1402 & seq.

(4) *Disclaimer*.—See 4 Min. Inst. 1422.

(5) *Answer*.—See 4 Min. Inst. 1423 & seq.

(6) *Replication*.—See 4 Min. Inst. 1444 & seq.

(7) *Settlement of Accounts*.—See 4 Min. Inst. 1467 & seq., and titles *Commissioner of Accounts* and *Commissioner in Chancery*.

(8) *Decree*.—See 4 Min. Inst. 1446 & seq., and title *Judgment Lien*.

(9) *Re-hearings and bills of review*.—See 4 Min. Inst. 1505 & seq; Code, §§ 6095, 6316, 6337, 6395.

(10) *Appeal*.—See 4 Min. Inst. 1509, and title *Appeals*.
§ 4. Statutory provisions as to pleading.—For the chapter as to “Rules and Pleadings,” modifying common law and equity pleading, see Code, §§ 6074-6140, and Acts 1920, p. 28, amending § 6105, and Acts 1922, p. —.

§ 5. Various forms of pleas.—

NO. 1. PLEAS IN CIVIL CASES AT LAW

[See Hurst's Forms, Nos. 429-85; 4 Min. Inst., 1733-63.]

NO. 2. PLEAS AND PLEADINGS IN EQUITY

[See Hurst's Forms, Nos. 486-9; 4 Min. Inst., 1419-22.]

NO. 3. PLEA TO THE JURISDICTION OF THE COURT IN CRIMINAL CASE

(Hurst's G. & M., p. 581.)

And the said C. D., in his own proper person, comes into court here, and having heard the said indictment read, says, that the court here ought not to take cognizance of the offense in the said indictment above specified, protesting that he is not guilty of the same; nevertheless, the said C. D. says [here state the matter of the plea]; and this the said C. D. is ready to verify: wherefore he prays judgment if the court here will or ought to take cognizance of the indictment aforesaid; and that he may be discharged and permitted to go without delay.

NO. 4. REPLICATION TO PLEA TO JURISDICTION IN CRIMINAL CASE

(*Idem.*)

And hereupon D. S., attorney for the Commonwealth, says, notwithstanding anything by the said C. D. in his plea above alleged, this court ought not to be precluded from taking cognizance of the indictment aforesaid, because, he says [here state the matter of the

replication]; and this the said D. S. is ready to verify (or *prays may be inquired of by the country*): whereby he prays judgment that the said C. D. may be held to answer the said indictment.

No. 5. PLEA IN ABATEMENT IN CRIMINAL CASE

(*Idem.*)

And the said C. D., in his own proper person, comes into court here, and, having heard the said indictment read, says that he ought not to be compelled to answer the said indictment, because, he says [here state the matter in abatement]; and this the said C. D. is ready to verify (or *prays may be inquired of by the country*): wherefore he prays judgment of the said indictment, and that the same may be quashed.

No. 6. REPLICATION TO PLEA IN ABATEMENT IN CRIMINAL CASE

(Hurst's G. & M., p. 582.)

And hereupon D. S., attorney for the Commonwealth, says, that the said indictment, by reason of anything by the said C. D., in his plea above, alleged, ought not to be quashed, because, he says [here state the matter of the replication]; and this said D. S. is ready to verify (or *prays may be inquired of by the country*): wherefore he prays judgment that the said indictment be not quashed.

No. 7. PLEA OF AUTREFOIS ACQUIT OR AUTREFOIS CONVICT

(Hurst's G. & M., p. 582; Code, §§ 4773-4.)

And the said C. D., in his own proper person, comes into court here, and, having heard the said indictment read, says, that the Commonwealth ought not further to prosecute the said indictment against him the said C. D., because, he says, that heretofore, to-wit, at [here set forth *verbatim* the caption of the session of the court, and the entire record of the former judgment of acquittal or conviction] as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect. And the said C. D. avers, and in fact says, that he the said C. D., and the said C. D. so indicted and acquitted (or *convicted*) as aforesaid, are one and the same person, and not other or different persons, and that the offense of which the said C. D. was indicted and acquitted (or *convicted*) as aforesaid, and the offenses of which the said C. D. is now indicted, are one and the same, and not different offenses; and this the said C. D. is ready to verify: wherefore he prays judgment that he may be dismissed and discharged by the court here, from the premises in the present indictment specified.

[Replication to above plea may be made *ore tenus*.]

POWER OF APPOINTMENT

- § 1. Definitions
- § 2. Powers may be general or special
- § 3. Power coupled with a trust
- § 4. Delegation of the power
- § 5. Exercise of power in case of joint donees
- § 6. Execution of the power
- § 7. Extension or suspension of a power.

§ 1. Definitions.—A power of appointment is an authority conferred by one person (called the donor or giver of the power) on another person (called the donee of the power, who by its exercise becomes its appointor), enabling him to dispose of an interest vested either in himself (the donee) or in the other (the donor) to a third person (the appointee, the person who takes under the appointment).

So the power may be where the donee has an interest in the land, when it is said to be “a power coupled with an interest;” as, where land is willed to an executor with the power to sell and pay debts, or legacies, etc.; or it may be where he has no interest, when it is said to be a “naked” or “bare” power; as, where a testator, without willing the land to his executor, by his will confers on him the power to sell, to pay debts or legacies, etc., or where A conveys or wills land to such person as B shall appoint by deed or will. (Graves’ Real Prop., §§ 235-6; 2 M’s Real Prop., §§ 1317-18.)

§ 2. Powers may be general or special.—A power is general, where the donee may dispose of any estate or interest in the land, and to any person whatsoever; special, where the appointment is restricted to particular persons, or as to the estate or as to the purposes or conditions of its exercise.

Where a power is special to a particular class, as, children or grandchildren, it is not legal to appoint only a nominal share to one or more, but each must have a substantial portion, though the shares need not be equal. Such invalid appointment is called an “illusory appointment.”

Under a special power to divide property among children, a fee simple may be given to one, a life estate to another, with a remainder or executory (or future) limitation to another. And a power to sell land (as, in case of our executor or trustee) confers the power to make a conveyance.

As to a power special as to conditions or purposes, if the condition be precedent, it must be complied with before the power is exercised; as, the request of the creditor to sell, in case of a deed of trust; or the necessity existing, in case of a power to sell land when necessary for some one's support, or the existence of debts, in case of a power in a trustee or executor to sell land to pay debts. (2 M's Real Prop., § 1319.)

§ 3. Power coupled with a trust.—A power is usually in the nature of a privilege or right, whose exercise is optional with the donee; but sometimes a trust is coupled with it, when it is called "a power coupled with a trust", whose execution, like any other trust, a court of equity will compel; as, a power to an executor to sell and apply the proceeds to certain persons, or to pay certain debts; and if the appointment be for a class of persons (as, "children", "sons", etc.), and the donee does not in his lifetime exercise the power, the court may do so, but must give all equally, for "equality is equity." (2 M's Real Prop., § 1330.)

§ 4. Delegation of the power.—A mere "naked" or "bare" power (see section 1, above) of trust and confidence cannot be delegated to another to exercise; but it may be done where there is no relation of trust or confidence, as in case of a general power (see section 2, above), or of a power conferred upon a trustee, executor, or other person in his official, not personal, capacity, as in case of a substituted trustee, or where a sole executor with power of sale refuses to qualify, resigns, or dies, and an administrator is appointed in his place. (2 M's Real Prop., § 1331.)

§ 5. Exercise of power in case of joint donees.—In the case of "bare" or "naked" powers (see section 1, above), all must unite, and death or refusal of one or more to act, defeats its execution; but otherwise if the power, though "naked," is given to them in an official capacity, rather than personally, as, in the case of joint executors, the statute (§ 5393) as to refusal to qualify so providing. In the case of joint trustees and joint executors (as to which survivorship is not abolished—Code, §§ 5159-60), which are powers coupled with an interest, the survivor or survivors may execute the power, as the rest may do where one (or more) donee, trustee, or executor refuses to qualify, is removed, or resigns; and

where all the executors refuse to qualify, (resigning not mentioned), die, or are removed, an administrator with the will annexed executes the power (Code, § 5393); and similar provisions is made for substitution of trustees—see *Trusts and Trustees*, section 14. (2 M's Real Prop., § 1332.)

§ 6. Execution of the power.—The instrument creating the power must be strictly followed; as, where a deed is required, a will will not do, (but this may be relieved in equity), nor *vice versa*; if by will, it must be according to the requirements of the statute of wills (§§ 5229-30), and like a will it may be revoked or may lapse by the appointee's death in the testator's lifetime, and speaks only from his death.

The instrument executing the power need not recite the power, and may embrace other subjects, and several instruments may be used where one is contemplated.

The exercise of the power is a question of intention, which may be gathered from the instrument conferring the power, by reference to the property, and from the fact that otherwise the donee's act would be of no effect; and as to a will by the donee, section 5241 of the Code provides that "A devise or bequest shall extend to any real or personal estate (as the case may be), which the testator has power to appoint as he may think proper, and to which it would apply if the estate were his own property, and shall operate as an execution of such power, unless a contrary intention shall appear by the will"; the effect of which statute seems to be to shift the burden of proof (90 Va. 287, 288). The powers should not be exercised before the time the power comes into existence.

If the power is "coupled with a trust", and the donee fails to exercise the power, a court of equity will (see section 3, above); if not in the nature of a trust, but optional with the donee, and he fails to exercise the power, the property results or goes (if the instrument creating the power does not provide for such contingency) to the heirs or residuary devisees of the donor of the power (see Code, § 5239).

As to defective exercise of a power, equity will relieve defects of form only, not of substance. Where the appointment is bad at law, equity will sometimes give relief to one having an equity superior to the holder of the title, compell-

ing a conveyance of a good title to the appointee, but, this only, where he has paid a valuable consideration, such as purchasers, lessees, or creditors of the donee; or where there is a meritorious consideration of love and affection between the donee and appointee, as, in the case of parent and child, or husband and wife.

Equity will relieve against a fraudulent exercise of a power. (2 M's Real Prop., §§ 1333-9.)

§ 7. Extinction or suspension of a power.—A power may be extinguished or suspended: (1) Where it has been finally and fully exercised so that the entire interest to be appointed has been vested in the appointee; (2) where the purposes for which the power is to be executed have ceased to exist, as, where the power is to sell for division, and the parties have agreed to a division, or to sell for support, and the party has died; (3) where a condition precedent to the exercise of the power fails of occurrence, as, where the exercise of the power depends upon the previous assent of a third person, who dies without giving assent; (4) where the donee is estopped to exercise the power because its exercise would work a fraud upon innocent parties, as, where the power is coupled with an interest (see section 1, above), and is to be exercised during the continuance of the donee's estate or interest, the donee having a choice to transfer by virtue of his ownership or by his power, and his exercising the former estopping him to exercise the latter, which would deprive the former takers of their rights; (5) where the power is released by the donee, but a power coupled with a trust (see section 3, above) cannot be thus released. (2 M's Real Prop., §§ 1340-5.)

POWER OF ATTORNEY

See Agents and Agency

- § 1. Definition
- § 2. Recordation
- § 3. Forms of "powers of attorneys"

§ 1. Definition.—A power or letter of attorney is an

instrument of writing by one authorizing another to act as his agent or attorney-in-fact, either generally as to all matters, or specially as to particular acts; and when it is to execute a sealed instrument, it must be under seal. They are strictly construed. (Bouvier's Law Dictionary, title "Power of Attorney.")

§ 2. Recordation.—"A power of attorney may be admitted to record in any county or corporation" (Code, § 5203); and it should be recorded where an instrument executed under it is recorded, and for this purpose it must be acknowledged. Also, by Acts 1922, a power of attorney to confess judgment, must be acknowledged, otherwise the judgment is void; but this does not apply to notes and bonds discounted and held by banks or trust companies.

§ 3. Forms of "powers of attorneys."—

No. 1. GENERAL POWER OF ATTORNEY

(Code, § 5203.)

Know all men by these presents, that I, P. P., of ———, do hereby make, constitute, and appoint A. T. my true and lawful attorney in fact, for me and in my name to [here set forth the power conferred]; and to do all lawful acts and things whatsoever concerning the premises; as fully in every respect as I myself might or could do if I were personally present: and I hereby ratify and confirm all lawful acts to be done by my said attorney by virtue hereof. Witness my hand and seal, this ——— day of ———, 192—.

P. P. [L. s.]

For certificate of acknowledgment, see *Acknowledgments*.

No. 2. POWER OF ATTORNEY TO CONFESS JUDGMENT

(Code, § 6130, and Acts 1922, p—.)

Know all men by these presents, that I, P. P., of ———, do hereby make (constitute, and appoint A. T. my true and lawful attorney in fact, for me and in my name to "appear in the clerk's office of the circuit (or *corporation*) court of ——— county (or *city*), Virginia, in vacation, before the clerk of the said court (or *before said court in term time*), within ——— days after the date hereof, and confess judgment in favor of C. C. against me for the sum of \$——, and interest thereon from the ——— day of ———, 192—, and costs." (If on a particular bond, note, etc., name it. If on a writing, waiving the homestead, let the power, judgment and execution so state. See *Homestead and Other Exemptions*, section 1, (17).)

Acts 1922 requires a power of attorney to confess judgment to be acknowledged. See *Acknowledgments*.

NO. 3. NEGOTIABLE NOTE WITH POWER OF ATTORNEY TO CONFESS JUDGMENT.

[See under *Promissory and Negotiable Notes*, No. 5.]

NO. 4. A GENERAL POWER OF ATTORNEY TO RECEIVE DEBTS

(4 Min. Inst. 1294.)

Know all men by these presents, that I, C. C., of ———, do hereby make, constitute and appoint D. D. my true and lawful attorney in fact, for me and in my name, and to my use, to demand, sue for, recover and receive of E. E., &c., all and every such sum or sums of money, debts or demands whatsoever, as are now (or *during the continuance of this power shall become*) due and owing to me by the said E. E., and in default of payment thereof to have, use and take all lawful ways and means, in my name and otherwise, for the recovery thereof, by action, suit, or any manner of legal process, or otherwise, and to compound and agree for the same. And on receipt thereof to make and deliver for me, and in my name, acquittances or other sufficient discharges for the same; and to do all lawful acts and things whatsoever concerning the premises, as fully in every respect as I myself might or could do if I were personally present; and attorney or attorneys under him, for the purposes aforesaid, to make, and at his pleasure to revoke their power; hereby ratifying, allowing and confirming all and whatsoever my said attorney shall, in my name, lawfully do, or cause to be done, in and about the premises by virtue of these presents. Witness my hand and seal this ——— day of ———, in the year 192—.

C. C. [SEAL.]

If there are two attorneys, say "D. D., etc., and Z. Z., etc., jointly, and either of them severally, to be my true and lawful attorneys and attorney in fact, for me," etc.

NO. 5. POWER OF ATTORNEY TO SELL LAND

(4 Min. Inst. 1594; Tate's Forms, 90.)

Know all men by these presents, that I, C. C., of ———, do hereby make, constitute and appoint D. D., of ———, my true and lawful attorney in fact, for me and in my name to bargain, sell, grant, release and convey to such person or persons, and for such sum or sums of money, or other consideration or considerations as my said attorney shall deem most for my advantage and profit, all that tract or parcel of land, situate and being in (describe the property with convenient particularity), and upon such sale or sales convenient and proper deeds, with such covenant or covenants of warranty, general or special, as to my said attorney seem expedient, in due form of law, as my deed or deeds, to make, sell, deliver and acknowledge for registry, and for me and in my name to accept and re-

ceive all and every the sum or sums of money, or other consideration or considerations whatsoever, which shall be coming to me on account of the said sale or sales, and upon the receipt thereof, suitable acquittance or acquittances, in my name and on my behalf, to make, seal and deliver. And I do empower my said attorney in fact to make an attorney or attorneys under him, for the purposes aforesaid, or any of them, and the power of such attorney or attorneys at his pleasure to revoke; and generally to my said attorney I give full power and authority touching the premises, to do, execute, proceed with and finish in all things, in as ample a manner as I might do if personally present; hereby ratifying and confirming all lawful acts done by my said attorney in virtue thereof.

Witness my hand and seal, this _____ day of _____, in the year of our Lord, 192—.

C. C. [SEAL]

NO. 6. POWER OF ATTORNEY TO ACKNOWLEDGE A DEED

(Tate's Forms, 1220.)

To all persons to whom these presents shall come, C. E., of _____, sendeth greeting.—Whereas I, the said C. E., have signed, sealed, and my deed delivered, one indenture, bearing date the _____ day of _____, and made between _____ and _____, as by the said indenture may appear: Now know ye, that I, the said C. E., have made, ordained and constituted, and do hereby make, ordain and constitute H. A., of _____, my true, sufficient and lawful attorney for me, and in my name, place and stead, to appear before any justice of the peace of _____ county, or any other officer authorized to receive such acknowledgment, and for me and in my name, place and stead to acknowledged the said indenture to be my own proper act and deed.

In testimony whereof, I, the said C. E., have set my hand and seal, this _____ day of _____, in the year 192—.

C. E.

NO. 7. POWER OF ATTORNEY TO SELL STOCK AND RECEIVE DIVIDENDS

(Tate's Forms, 123.)

Know all men by these presents, that I, B. D., of _____, have made, ordained and constituted, and do hereby make, ordain and constitute H. A., of _____, to be my true, sufficient and lawful attorney, for me, and in my name, place and stead, to sell and transfer unto any person or persons whatever, and for such price as my said attorney shall think fit, _____ shares of stock of the _____ company (or bank), and also for me, and in my name, place and stead, to make and pass all necessary acts of assignment, and to receive and give receipts for me for consideration money arising from the sale thereof; and also for me and in my name, place and stead, to receive and give receipt for all interest and dividends now due, or that shall become due on the stock.

as aforesaid, until the sale and transfer thereof. Hereby ratifying and confirming all lawful acts done by my said attorney by virtue hereof.

In testimony whereof, I, the said B. D., have set my hand and seal, this ——— day of ———, in the year 192—.

B. D.

No. 8. POWER OF ATTORNEY TO DRAW, NEGOTIATE AND ENDORSE BILLS OF EXCHANGE, &c.

(Tate's Forms, 130.)

Know all men by these presents, that I, F. C., of ———, have made, constituted, authorized and appointed, and by these presents do make, constitute, authorize and appoint R. B., of ———, my true and lawful attorney for me, and in my name, place and stead, to make and draw bills of exchange upon any person or persons, on account of moneys due me for the sale of my goods, wares and merchandise, and as my attorney, in my name, place and stead, to subscribe the same, selling and negotiating them for my best advantage, and receiving and holding the proceeds to my use. And I do hereby give and grant unto my said attorney, full power and authority, for me, in my name, place and stead, to endorse any bill or bills of exchange or other notes, which shall be drawn payable to me, and the same to sell or negotiate for my best advantage, receiving and holding the proceeds resulting from such sale or negotiation to my use. And generally, for me, the said F. C., in my name and to my use, to do or cause to be done all other lawful acts, deeds, matters and things, which shall or may be requisite and necessary to be done in and about the premises, as fully and effectually, to all intents and purposes, as I, the said F. C., might or could do if personally present and did the same. Hereby giving and granting to my said attorney my whole power and authority in the premises, and hereby ratifying, allowing and confirming all and whatsoever my attorney shall lawfully do or cause to be done in and about the premises by virtue of these presents. Witness my hand and seal, this ——— day of ———, 192—.

F. C.

No. 9. POWER OF ATTORNEY TO RECEIVE THE DISTRIBUTIVE SHARE OF AN INTESTATE'S ESTATE

(Tate's Forms, 133.)

To all to whom these presents shall come, I, B. C., of ———, send greeting: Whereas, J. C., my sister, lately died intestate, by means whereof, and by virtue of the statutes made for better distributing intestate estates, I am become legally entitled to a distributive share of my sister's personal estate. Now know ye, that I, the said B. C., having and reposing great confidence in A. W., of ———, have made, constituted and appointed, and by these presents do make, constitute and appoint the said A. W., my true and lawful attorney, for me, and in

my name, to sue for, ask and demand, recover and receive of and from N. T., administrator of the said J. C., all my distributive share of the personal estate of my said sister, which I am by law entitled unto, and all other sum and sums of money, goods, chattels and personal estate whatsoever, which by my said sister's dying intestate, or any other account, belonging or of right ought to belong to me. And upon receipt thereof, acquittances and other legal discharges for me and in my name to give to the administrator of my said sister, for what my said attorney shall receive, and to make any agreement or composition for my said distributable share of my said sister's personal estate, or for any other matter or thing due to me from her estate, and whatsoever my said attorney shall do or cause to be done in and about the premises, I do hereby ratify and confirm the same, as fully, to all intents and purposes as if I were personally present and did the same. Witness my hand and seal, this ——— day of ———, 192—.

B. C.

No. 10. POWER OF ATTORNEY TO RECEIVE AND RECOVER RENTS, AND TO GIVE DISCHARGES

(Tate's Forms, 134.)

Know all men by these presents, that I, H. S., of ———, for divers good causes and considerations, to me hereunto especially moving, have made, ordained, constituted and appointed, and by these presents do make, ordain, constitute and appoint, and in my place and stead put and depute N. O., of ———, my true and lawful attorney, for me, and in my name, and to my use, to ask, demand, levy, recover and receive of and from B. M., of ———, the lessee of all that messuage or tenement and premises situate in ———, and also of and from all other tenants or occupiers thereof respectively, all sum and sums of money now in arrear for rent, or hereafter to grow due for rent for the same respective premises in ———, and on receipt thereof, or of any part thereof, good and sufficient receipts and acquittances in the law, for me, the said H. S. and in my name, or in his own name, as my attorney, to make and give for the same, as the case, shall require, and on refusal or non-payment thereof, or of any part thereof, to commence and prosecute one or more action or actions, or to make one or more distress or distresses for rent, and to proceed therein as he shall be advised, and to take all other lawful ways and means to compel the payment thereof, that he shall judge expedient. And generally, for me, and in my name, and to and for the use and purposes aforesaid, to do and perform all and whatsoever other acts, matters and things which shall be requisite and necessary in the premises, as fully and amply, to all intents and purposes, as if I, the said H. S., were present and did the same. And I do hereby ratify and confirm whatsoever the said N. O., my attorney, shall lawfully do or cause to be done therein by virtue thereof.

In testimony whereof, I, the said H. S., have set my hand and seal, this ——— day of ———, in the year 192—.

H. S.

No. 11. POWER OF ATTORNEY TO RECEIVE A LEGACY

(Tate's Forms, 138.)

To all persons to whom these presents shall come, A. T., of —, sendeth greeting:—Whereas, M. S., late of —, by her last will and testament, bearing date — day of —, in the year 192—, did give and bequeath unto me, A. T., of —, — dollars, to be paid unto me, upon my sealing and delivering a general release to the executor of the said M. S., and made and constituted E. F., of —, her executor; and shortly afterwards, to-wit: on the — day of —, in the year 192—, died. And whereas, the said E. F. hath proved the said will, and I, the said A. T., have sealed such general release to the said E. F., as by the said will is directed, and left the same in the hands of my attorney hereinafter named, to be delivered to the said E. F., on payment of the said sum of \$—. Now Know ye, that I, the said A. T., have made, ordained, constituted, deputed and appointed, and by these presents do make, ordain, constitute, depute and appoint B. H., of —, my true and lawful attorney, for me and in my name, and to my use to ask, demand and receive of and from the said E. F., the said legacy of —, so given and bequeathed to me, the said M. S., by her said will as aforesaid, and upon receipt thereof by my said attorney, to deliver the said general release so sealed as aforesaid, or to give such other discharge as shall be sufficient. I hereby ratifying, allowing and confirming all and whatsoever my said attorney shall lawfully do in the premises.

In testimony whereof, I, the said A. T., have hereunto set my hand and seal, this — day of —, in the year 192—.

A. T.

No. 12. SUBSTITUTION UNDER A POWER OF ATTORNEY

(Tate's Forms, 139.)

Know all men by these presents, that I, A. B., of —, in pursuance and by virtue of the powers invested in me, by P. H., —, by a power of attorney under his hand and seal, bearing date the — day of —, in the year 192—, have substituted, deputed and appointed, and by these presents to substitute, depute and appoint E. F., of —, to be my true and lawful attorney to [here insert the power contained in the original letter], giving, and by these presents granting unto the said E. F., my full and whole derived power and authority in the premises, in as full and ample manner, to all intents and purposes, as I have received the same from the said P. H., by the said herebefore mentioned power of attorney. I, the said A. B., as well for the said P. H., as for myself, hereby agreeing to ratify, allow, indemnify and confirm all and whatsoever the said E. F. shall lawfully do therein, by virtue of this, my substitution.

In testimony whereof, I, the said A. B., have hereunto set my hand and seal, this — day of —, in the year 192—.

A. B.

No. 13. REVOCATION OF A POWER OF ATTORNEY

(Tate's Forms, 140.)

Know all men by the presents, that I, H. B., of ———, for divers good causes and considerations to me hereunto especially moving, have revoked, countermanded, annulled and made void and of no effect, and by these presents do revoke, countermand and make void and of no effect, a certain power of attorney under my hand and seal, bearing date the ——— day of ———, in the year 192—, to A. C., of ———, given, delivered and executed, and all powers and authorities whatsoever therein expressed and declared.

In testimony whereof, I, the said H. B., have hereunto set my hand and seal, this ——— day of ———, in the year 192—.

H. B.

PRIZE FIGHTS

For prize fights, pugilism, and fights between men and animals, and their aiders and abettors, see Code, §§ 4426-7.

PROBATION OFFICERS

See, also *Juvenile and Domestic Relations Courts; Minors, etc.*, sections 30, (10), (11), 37, (5), (6).

- § 1. Appointment
- § 2. Sentence of probation
- § 3. Transfer of probationer from one officer to another
- § 4. Duties and reports of probation officer
- § 5. State Board of Public Welfare to co-operate

§ 1. **Appointment.**—A judge of a court having criminal jurisdiction, a police justice, and a justice of a juvenile and domestic relations court may, upon recommendation of the State Board of Public Welfare, appoint one or more reputable persons, male or female, to act as probation officers under the direction of the court making the appointment, whom he may remove for cause after due notice and opportunity to be heard. Upon request of the judge, the city council or the

board of supervisors fixes the salary. The State Board of Public Welfare makes rules and regulations to the end that appointments shall be based upon merit only. An appointee of a circuit judge may be required by him to act in county or city within his circuit, the salary being pro rated according to population. In cities, the same person may be designated by the judges of two or more courts. When more than one is appointed, one may be designated as chief probation officer. (Acts 1918, p. 528, § 1.)

§ 2. Sentence of probation.—"After a plea or a verdict of guilty in any court having jurisdiction to hear and determine the offense with which the prisoner at the bar is charged, if there be circumstances in mitigation of the offense, and if it appear compatible with the public interest, or in any case after a child has been declared delinquent or dependent, the court may suspend the imposition or the execution of sentence, or commitment and may also place the defendant on probation under the supervision of a probation officer, during good behavior, for such time and under such conditions of probation as the court shall determine. The court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation. While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation, or may be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, or may be required to provide for the support of his wife or others for whose support he may be legally responsible.

"The court may revoke the suspension of sentence and cause the defendant to be arrested and brought before the court at any time within the probation period, or within the maximum period for which the defendant might originally have been sentenced to be imprisoned, whereupon, in case the imposition of sentence has been suspended, the court may pronounce whatever sentence might have been originally imposed; and in case the execution of the sentence has been suspended, the original sentence shall be in full force and effect, and the time of probation shall not be taken into account to diminish the original sentence. In the event that any person placed

on probation shall leave the jurisdiction of the court without the consent of the judge, or having obtained leave to remove to another locality violates any of the terms of his probation, he may be apprehended and returned to said court and dealt with as provided above." (Id., § 2.)

§ 3. Transfer of probationer from one officer to another.—"The court placing any person on probation may transfer such person from the supervision of one probation officer to that of another probation officer, and such transfer shall be reported by the court to both of such probation officers and to the person on probation and a record of the transfer shall be filed with the records of the case or entered upon the records of the court. Whenever a person placed on probation resides in a locality removed from that in which the court which placed such person on probation is situated, or whenever a person on probation desires to remove to a locality other than that in which the court is situated, the court placing such person on probation may transfer such person to a probation officer regularly appointed and authorized to serve for the locality in which such person resides or to which he is to move, provided such probation officer sends to the court desiring to make such transfer a written statement that he will exercise supervision over such person, and provided such statement is approved in writing by the judge of the court to which such probation officer is attached. Such probation officer shall report concerning the conduct and condition of such probationer at regular intervals to the judge of the court who placed the defendant on probation." (Id., § 3.)

§ 4. Duties and reports of probation officer.—"Every probation officer shall thoroughly investigate all cases referred to him for investigation by any court in which he is serving and shall report thereon to the court. The probation officer shall furnish to each person placed on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Said conditions shall be prescribed by the judge having jurisdiction of the case. The probation officer shall keep informed concerning the conduct and condition of each person under his supervision by visiting, requiring reports and in other ways,

and shall report thereon at least monthly to the court placing such person on probation. He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid and encourage persons on probation and to bring about improvement in their conduct and condition. He shall keep detail records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the State Board of Charities and Corrections (now State Board of Public Welfare) as it may require; and shall perform such other duties as the court may direct. Any probation officer when so directed by the court in which he is serving shall act as parole officer over persons released from any public correctional institutions upon request or with the consent of the governor of this State, or of the authorities of such institution, as the case may be. Every probation officer appointed under the provisions of this act, shall have all the powers and authority of a police officer or of a constable." (Id., § 4.)

§ 5. State Board of Public Welfare to co-operate.—
"The State Board of Charities and Corrections (now State Board of Public Welfare) is hereby authorized and directed to co-operate in every way possible with the courts of this Commonwealth in putting this law into operation and making it effective and useful; it shall conduct examinations or inquiries as to the fitness of applicants for appointment as probation officer and shall make recommendations thereon to the proper courts; it shall prepare standard forms for the use of probation officers, and shall in general supervise and foster probation work in this State." (Id., § 5.)

PROCESS

(See "Burks' Pleading & Practice" (new ed.).)

See *Sheriffs, Sergeants, Constables, etc.*; and notes to sections cited of Code 1919

- § 1. Direction, issue, and return
- § 2. When may be executed without the county or city
- § 3. How served
- § 4. Order of publication

§ 1. Direction, issue, and return.—By section 6055 of the Code: "Process from any court, whether original, *mesne*, (i. e., between the beginning and end of the suit), or final, may be directed to the sheriff or sergeant of any county or city. It shall, if returnable to rules, be issued before the rule day to which it is returnable, and may, except where otherwise provided, be executed on or before that day. If it appear to be duly served and good in other respects, it shall be deemed valid although not directed to any officer, or if directed to an officer, though executed by some other person. It shall, unless otherwise specially provided, be returnable within ninety days after its date to some day of the term of a court, or in the clerk's office to the first day of any rules, except that a summons for a witness shall be returnable to whatever day his attendance is desired, and process awarded in court may be returnable as the court shall direct, and the return day on a summons in garnishment may be according to the provisions of section 6509." As to how issued, officer's duty to get from clerk's office, and new process, etc., see Code, §§ 6059-61.

§ 2. When may be executed without the county or city.—By section 6056 of the Code: "Process against the defendant to answer in any action, suit, or motion brought under section six thousand and fifty, shall not be executed in any other county or city than that wherein the action, suit or motion is brought, unless it be:

- (1) An action against a corporation; or
- (2) An action upon a bond taken by an officer under authority of some statute; or
- (3) An action to recover damages for a wrong; or

(4) An action against two or more defendants on one of whom such process has been executed in the county or city in which the action is brought; or

(5) Unless it be otherwise specially provided."

The sheriff of a county wherein is a city or a part thereof, may execute in such city or part, any process which he might execute in any other portion of his county (Code, § 6057).

§ 3. How served.—Process is served as a notice is served—see *Notice*; except as to corporations—see *Corporations*, section 12. As to unincorporated associations or orders, and common carriers not incorporated, see *Suits or Actions*, section 3.

As to service of summons for a witness or juror, Acts 1922 adds the following to section 6062 of the Code: "In addition to the mode of service above prescribed, a summons for a witness or for a juror may be served at his or her usual place of business or employment, during business hours, by delivering a copy thereof and giving information of its purport to the person found there in charge of such business or place of employment."

For returns upon process, see forms under *Sheriffs, Sergeants, Constables*, etc., and other forms referred to under *Notice*.

§ 4. Order of publication.—See *Order of Publication*.

PROFANITY AND DRUNKENNESS

§ 1. Profane swearing and drunkenness; how punished.—"If any person arrived at the age of discretion profanely curse or swear or get drunk in public he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$1 nor more than \$10." (Code, § 4568.)

§ 2. Cursing another.—See *Abusive Language*.

§ 3. Form of "description" in warrant.—

NO. 1. PROFANE SWEARING OR DRUNKENNESS.

DESCRIPTION:

"then being of the age of discretion, did get drunk (or did profanely curse and swear by uttering with a loud voice, in the presence of divers persons, these profane words (stating them)).

PROHIBITION (WRIT OF)

(See "Burks' Pleading & Practice" (new ed.).)

- § 1. Definition
- § 2. Cases where prohibition lies
- § 3. Statutory provisions

§ 1. **Definition.**—A writ of prohibition is a writ to prohibit or prevent an inferior or subordinate court from exceeding its jurisdiction, in cases where there is no other adequate remedy. (Bouvier's Law Dictionary.)

§ 2. **Cases where prohibition lies.**—The common law controls the cases where the writ lies. Prohibition lies: (1) Where the title to real estate is *bona fide* drawn in question before a justice of the peace; (2) where a claim has been split to give a justice jurisdiction; (3) where a county court without authority granted the writ to a justice; (4) where a county without authority is proceeding to give judgment for costs in a contested election case; (5) where a circuit court is taking, without authority, appellate jurisdiction of a cause decided by the county court.

The statute law allows the writ to enforce the law relating to primaries (§ 224), and against a city or town to carry out an order annexing territory (§ 2965), and from the Court of Appeals to the State Corporation Commission (Va. Const., § 156).

Prohibition has been denied: (1) To restrain a city mayor from trying cases under a city ordinance alleged to be in conflict with a State law; (2) to restrain any inferior court from exercising jurisdiction in any particular case, if that court has jurisdiction in any case of that kind; (3) to restrain a city mayor, as to his executive functions, the writ being applicable only to inferior courts; (4) to restrain an inferior court after its judgment has been given and fully executed. (4 Min. Inst., 385-6.)

§ 3. **Statutory provisions.**—See Code, §§ 5831-40.

For venue, see Code, § 6053.

For jurisdiction of Court of Appeals, see §§ 5864; 5872; circuit courts, § 58920; Richmond courts §§ 5922, 5928; Norfolk courts, § 5935; Roanoke courts, § 5947.

PROMISSORY AND NEGOTIABLE NOTES

See *Bonds*

- § 1. Definition
- § 2. Joint, several, or joint and several note
- § 3. Bond, note, or other writing, payable to person who is dead, is valid
- § 4. Action on a note
- § 5. Forms under "Promissory and Negotiable Notes."

§ 1. **Definition.**—A promissory note is a promise in writing, not under seal, to pay a designated sum of money; if under seal, it would be a bond—see *Bond*; and if payable to the order of some one or to bearer, it is a negotiable promissory note, which is technically defined by section 5746 of the Code to be "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money, to order or to bearer"; and where drawn to the maker's own order it is not complete till endorsed by him; and by section 5579 if an instrument is so ambiguous that there is a doubt whether it is a bill of exchange or a negotiable promissory note, the holder may treat it as either; and by section 5692 where in a bill of exchange drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat it either as a bill of exchange or a negotiable promissory note.

§ 2. **Joint, several, or joint and several note.**—Under our present statutes (Code, §§ 5762, 6047, 6102, 6263, 6265), it matters but little whether a promise is several, joint, or joint and several. But see 3 Min. Inst. 390-2.

§ 3. **Bond, note, or other writing, payable to person who is dead, is valid.**—See Code, § 5761.

§ 4. **Action on a note.**—Action may be maintained on a note or bond for any past due instalment of a debt payable in instalments, although other instalments thereof be not due; and no consideration need be proved for such note or bond, and no proof of the handwriting of the signature of a note is necessary, unless it be denied by affidavit (Code, §§ 5760, 6125). The signature of a bond is denied by the sworn plea of *non est factum* (Code, § 6124).

§ 5. Forms under "Promissory and Negotiable Notes."

No. 1. PROMISSORY NOTE, NOT NEGOTIABLE

\$500.

_____ days (or *months* or *years*) after date (or *on demand* or *at sight*), I promise to pay to C. C. five hundred dollars, for value received.

Given under my hand, this _____ day of _____, 192—.

D. D.

No. 2. NEGOTIABLE PROMISSORY NOTE.

(Code, § 5746.)

\$500.

Pulaski, Va., _____.

_____ days (or *months*, &c.) after date (or *on demand* or *on presentation*), for value received, I promise to pay to the order of C. C. (or *to O. O. or order*, or *to bearer* or *to O. O. or bearer*), five hundred dollars, negotiable and payable at the Peoples Bank of Pulaski, Pulaski, Va. (It is not now necessary to add "negotiable," &c., but it is convenient to retain it.) The maker and endorsers of this note hereby severally waive the benefit of their homestead exemptions as to this debt.

D. D.

No. _____. Due _____.

P. O. _____.

It is customary to add the following:

And the maker and each endorser of this note hereby waive the presentment of this note and demand for its payment, and also waive the protest, notice of dishonor and non-payment of this note, and it is expressly agreed by both maker and endorser that should the holder of this note give notice of presentment, demand for payment, protest, notice of dishonor and non-payment of same that the giving of such notice shall in no way effect or impair the validity of the above waiver, said waiver being to save expense and inconvenience to the maker and endorsers; and agree that the time of payment may be extended without notice or consent and without affecting their liability, and agree, if suit is brought hereon, to pay ten per cent. attorney's fees, which shall be added to and become a part of the judgment.

For form of protest, see *Bills of Exchange*.

No. 3. NEGOTIABLE NOTE PAYABLE IN INSTALLMENTS

(Code, § 5564.)

\$500.

Capron, Va., May 10, 1921.

For value received, I promise to pay to the order of R. E. (or to R. E., if a mere promissory note not negotiable) five hundred

dollars, with interest from date, in instalments, as follows: \$100, thirty days after date; \$100, sixty days after date; and \$300, ninety days after date; and I hereby waive my homestead exemptions as to this debt. Upon default in payment of any of said instalments or of interest, the whole amount unpaid, with interest, shall become due and payable.

S. N.

No. 4. NEGOTIABLE NOTE WITH COLLATERAL SECURITIES

(This note meets the approval of the Federal Reserve Bank.)

\$500.00.

Norfolk, Va., December 20, 1921.

Ninety days after date, the undersigned, jointly and severally, promise to pay to The Seaboard National Bank of Norfolk, or order, negotiable and payable without offset, at said Bank, five hundred dollars, for value received; having deposited with said Bank, as collateral security for the payment of this note, or any note given in extension or renewal thereof, as well as for the payment of any other liability or liabilities of the undersigned to the said Bank, due or to become due, whether now existing or hereafter arising, the following property, namely: [here insert the collaterals] of a present market value hereby agreed by the undersigned to be \$1,000.00, with authority to sell, transfer or rehypothecate said collateral, it being understood that on payment or tender of the amount so due, the holder hereof return to the undersigned an equal quantity of said securities instead of the securities deposited, and the undersigned agrees to deliver to the holder additional securities to the satisfaction of the holder should the market value of the said securities suffer any decline, and also hereby gives to the holder a lien for the amount of all the said liabilities whether then due or not due upon all property or securities given to or left in the possession of the holder by the undersigned and also upon any balance of the deposit account of the undersigned with the holder.

And the undersigned, for value received, hereby further agrees that upon the non-performance of this promise or upon the non-payment of any of the liabilities above mentioned, or upon the failure of the undersigned, forthwith, with or without notice, to furnish additional securities satisfactory to the holder, in case of a decline as aforesaid, then and in any such case this note and all other liabilities of the undersigned and any and all of them shall forthwith become due and payable without demand or notice, and full power and authority is hereby given to the holder of this note, to sell, assign and deliver the whole or any part of the above named property and securities, or any part thereof or of any substitutes therefor, or of any addition thereto, at public or private sale, or at any Brokers Board or Exchange, at the option of the holder hereof, without demand, advertisement or notice of any kind, which are hereby expressly waived in respect to any and all such methods of sale; and at any such sale the holder hereof may purchase the whole or any part of the property sold free from any right of redemption on the part of the undersigned which is hereby expressly waived and released.

In case of sale for any cause, after deducting all legal and other costs and expenses for collection, sale and delivery, the holder may apply the residue of the proceeds of the sale, or sales, so made to pay any, or all of said liabilities to the holder as the holder shall deem proper, whether then due or not due, making proper rebate for interest on liabilities not then due and returning the overplus, if any, to the undersigned; and the undersigned also agrees to be and remain liable to the holder hereof for any deficiency.

The makers and endorsers of this note hereby waive protest and the benefit of any exemptions under the Homestead or Bankrupt Laws as to this debt, and agree to pay all expenses incurred in collecting the same, including ten per cent. attorneys fees, in case this note shall not be paid at maturity.

No. _____. Due_____.

P. O. _____.

D. D.

No. 5. "JUDGMENT NOTE," OR NOTE WITH AUTHORITY TO CONFESS
JUDGMENT.

(Code, § 5567; Acts 1922; 120 Va. 812.)

\$500.

Richmond, Va., August 1, 1922.

Sixty days after date, for value received, I promise to pay to the order of R. E., five hundred dollars. The maker and endorsers of this note hereby, severally waive the benefit of their homestead exemptions as to this debt. And I, the maker, do hereby make, constitute and appoint A. T., my true and lawful attorney in fact for me and in my name, in case of default of payment of this note when due, to appear in the clerk's office of the circuit court of _____ county, Virginia, in vacation, or before the said court in term time, and confess judgment in favor of the said R. E. against me, for the amount of this note, with interest and costs, with my waiver of homestead noted therein.

Witness my hand and seal.

S. N. [SEAL.]

Virginia, _____, county (or corporation), to-wit: .

The above power of attorney for confession of judgment was acknowledged by S. N. before me in my said county, this _____ day of _____, 192—.

N. O., N. P. (or J. P.)

Acts 1922 requires such acknowledgment.

PUBLIC HOLIDAYS

- § 1. What days are
- § 2. What acts may be done on holidays or Saturdays.
- § 3. Presentment of negotiable paper for payment or acceptance or other act not to be on holiday or Saturday.

§ 1. What days are.—The following days are public holidays: January 1st; January 19th (Lee-Jackson day); February 22nd (Washington's birthday); May 30th (Confederate Memorial Day); July 4th (Independence Day); 1st Monday in September (Labor Day); Tuesday after 1st Monday in November (Election Day); November 11 (Armistice Day); December 25 (Christmas); or any day appointed or recommended by the Governor or the President as a day of national thanksgiving; or fasting and prayer, or other religious observances; and every Saturday after 12 o'clock noon as to the transaction of all business, except as to the maturity, the presentment for acceptance or payment and the protesting of negotiable instruments—see section 3, below. (Code, § 5758, as amended by Acts 1922.)

§ 2. What acts may be done on holidays or Saturdays.—No contract made, instrument executed, or act done on a public holiday or a Saturday afternoon is thereby rendered invalid, and this act shall not prevent or invalidate the entry, issuance, service, or execution of any writ, summons, confession, judgment, order or decree, or other legal process whatever, or the session or the proceedings of any court or judge on any such public holiday or Saturdays; nor prevent any bank, banker, bonding corporation, firm, or association from keeping open and transacting business thereon. (Code, § 5758, as amended by Acts 1922.)

Clerk's office is to be kept open on holidays except July 4th, Thanksgiving and Christmas. (Code, § 3388, as amended by Acts 1920, p. 242.)

§ 3. Presentment of negotiable paper for payment, or acceptance or other act not to be on holiday or Saturday.—A negotiable paper falling due on a holiday, Saturday, or Sunday, is payable, and a bill of exchange may be presented for acceptance, on the next business day which is not a Saturday, but instruments payable on demand, may, at the holder's option, be presented for payment, and a bill of ex-

change may be presented for acceptance, before 12 o'clock noon Saturday when that entire day is not a holiday. Where the day or the last day for doing any act required or permitted to be done by the "Negotiable Instruments Law," falls on a holiday or Sunday, the act may be done on the next succeeding secular or business day. (Code, §§ 5647, 5708, 5755.)

PUBLIC UTILITY COMPANIES

See Corporations.

- § 1. Definition of "public utility"
- § 2. Creation of public utility companies; costs
- § 3. General and special powers
- § 4. To file schedule of rates and charges; change or suspension of rates, etc.; appeal
- § 5. To furnish reasonably adequate service and facilities
- § 6. Service defined; tests and equipments therefore
- § 7. Reports when required to State Corporation Commission
- § 8. Commission to fix rates and regulations
- § 9. The State Corporation Commission may change regulations, measurements, practices, services, or acts
- § 10. Existing remedies retained
- § 11. Order of priority, where all customers cannot be served
- § 12. General laws applicable to public utilities
- § 13. Taxation of public utility companies. *See Taxation and Tax Bill*

§ 1. Definition of "public utility."—A "public utility" includes every corporation, other than a municipality, and every company, individual, or association of individuals, their lessees, trustees or receivers, that owns, manages, or controls any plant or equipment within this State for the conveyance of telephone messages, or for the production, transmission, delivery, or furnishing of heat, light, power or water either directly or indirectly to or for the public, but not including a hotel supplying heat, light, water, or power to a limited number of patrons out of its temporary surplus, nor to individual plants which furnish lights or electrical current or other power to inhabitants of towns or territory adjacent thereto in which operatives or employees of such plants

§ 9. The State Corporation Commission may change regulations, measurements, practices, services, or acts.—By section 4072 of the Code: “If upon investigation it shall be found that any regulation, measurement, practice, act or service of any public utility operating in this State complained of, is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of law or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the State Corporation Commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts and to make such order respecting, and such changes in, such regulations, measurements, practices, service or acts as shall be just and reasonable.”

§ 10. Existing remedies retained.—Nothing contained in the foregoing sections shall in any way abridge or alter the remedies at common law, in equity, or by statute, but the provisions shall be deemed to be in addition to such remedies. (Code, § 4073.)

§ 11. Order of priority, where all customers cannot be served.—See Acts 1920, p. 232.

§ 12. General laws applicable to public utilities.—The general provisions of the Code as to corporations in general (§§ 3776-3848, and Acts 1920, pp. 489, 494, 565, amending §§ 3780, 3846, 3847, respectively); and general provisions of the Code as to public service corporations (§§ 3881-3903, and Acts 1920, pp. 411, 20, amending §§ 3885, 3897, respectively),—apply to public utility companies—see *Corporations*.

§ 13. Taxation of public utility companies.—See *Taxation and Tax Bill*.

PURE FOOD AND DRUG LAWS

I. Food

- § 1. Meaning of "food"
- § 2. Adulteration
 - (1) In the case of confectionery
 - (2) In the case of other food
- § 3. Misbranding; "blend"
- § 4. Punishment
- § 5. Dairy and Food Commissioner

II. Drugs

- § 6. Meaning of "drug"
- § 7. Adulteration
- § 8. Misbranding
- § 9. Punishment
- § 10. As to sale of poisons, morphine, cocaine, etc.
- § 11. Pharmacy, practice of

We have a United States and also a State Pure Food and Drug Law, which are practically the same. Write the Secretary of the U. S. Department of Agriculture, Washington, D. C., for circular 136, giving the adopted "Standards of Purity for Food Products," which are adopted as standards here unless our department has fixed such standards. (Code, § 1185.)

§ 1. **Meaning of food.**—"It includes all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound" (Code, § 1180).

§ 2. **Adulteration.**—An article is adulterated:

"(1) *In the case of confectionery:*

If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

(2) *In the case of other food:*

(a) If any substance has been mixed or packed with it, so as to reduce or lower or injuriously affect its quality or strength.

(b) If any substance has been substituted wholly or in part for the article.

(c) If any valuable constituent of the article has been wholly or in part abstracted.

(d) If it be mixed, colored, powdered, coated, polished or stained in a manner whereby damage or inferiority is concealed.

(e) If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health. Provided, that when in the preparation of food products for shipments they are preserved by any external application in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package or furnished with the article, the provisions of this chapter shall be construed as applying only when said products are ready for consumption.

(f) If it consists in whole or in part of diseased, filthy, decomposed, or putrid animal or vegetable matter, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that had died otherwise than by slaughter.

(g) If the containing vessel or any part of it be of such composition as will be acted upon, in the ordinary course of use, by the contents thereof in such a way as to produce an injurious, deleterious, or poisonous compound." (Code, § 1181.)

§ 3. Misbranding; "blend."—The term "misbranded" shall apply to all articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substance contained therein, which shall be false or misleading in any particular, and to any food product which is falsely branded as to the State, territory, or country in which it is manufactured or produced.

An article shall also be deemed misbranded:

"(1) If it be an imitation of, or offered for sale under the distinctive name of another article.

(2) If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such package, or if it fail

to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanalide or any derivative or preparation of any such substance contained therein.

(3) If in package form, and the quantity of the contents not plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count; provided, however, that such reasonable variations shall be permitted, and tolerances and also exemptions as to small packages as shall be or are established by rules and regulations made in accordance with the provisions of section eleven hundred and eighty-five.

(4) If the package or its label shall bear any statement, design, or device regarding the ingredients or substance contained therein, which statement, design, or device shall be false or misleading in any particular; provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

(a) In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names, and not an imitation of, or offered for sale under the distinctive name of, another article of food, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

(b) In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations or blends, and having the word 'compound,' 'imitation,' or 'blend,' as the case may be, plainly stated on the package in which such article is offered for sale: provided, the labeling is according to the rules prescribed by the Dairy and Food Commissioner with the approval of the Commissioner and the Board of Agriculture and Immigration.

The term 'blend' as used in this chapter shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring or flavoring only. Nothing in this chapter shall be construed as requiring or compelling proprietors or

manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, except in so far as the provisions of this chapter may require to secure freedom from adulteration and misbranding." (Code, § 1182.)

§ 4. Punishment.—To manufacture, sell, expose for sale, or have in possession with intent to sell, either directly or through any agent, any adulterated or misbranded food, is punishable by a fine not over \$500, or jail not over 12 months, or both. (Code, §§ 1177, 4782.) And the Federal statute imposes the same punishment, with not less than \$1,000 fine nor 12 months jail, or both, for subsequent offense.

The Department of Agriculture and Immigration has the food examined or analyzed, and if it appears to be adulterated or misbranded, the party is notified and may be heard before the Dairy and Food Commissioner and the commissioner and Board of Agriculture and Immigration, and if the party appears to be guilty, the facts with an analysis or examination of the food is certified to the Commonwealth's attorney, for procedure by him. The sworn analysis or examination of the food is *prima facie* evidence of the facts stated. (Code, §§ 1178-9.)

A guaranty obtained by a dealer from the wholesaler, jobber, or manufacturer residing in Virginia, that the articles which he purchases from them are not adulterated or misbranded shall protect the party making the sale. But if the article is in a broken or open package, the party must furnish affidavit or other satisfactory proof that the article has not been changed in quality. The guaranty must contain the name and address of the wholesaler, etc., who then becomes liable. The guaranty will not protect after the first offense. (Code, § 1184.)

The Federal law has a similar provision as to guaranty, and further provides that "any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one state, territory, district, or peninsular possession, to another for sale, or having been transported remains unloaded or unsold, or if it be offered for sale, or if it be imported from a foreign country for sale, or intended for exportation to a foreign

country, is liable to be seized and confiscated, and may be destroyed or disposed of, and the proceeds, less the costs, paid into the treasury of the United States. But the owner may prevent such confiscation or sale by a good and sufficient bond that such articles are not to be sold or otherwise disposed of contrary to the provisions of this act. The Secretary of the Treasury is required to deliver to the Secretary of the Board of Agriculture, from time to time, samples of foods and drugs which are being imported in the United States for sale, or offered for exportation; and if found adulterated or misbranded within the meaning of this act, or dangerous to health, may refuse admission; but pending the decision on this matter, the goods may be delivered to the owner on the deposit of a good and sufficient security."

§ 5. Dairy and Food Commissioner.—For an extended act as the Dairy and Food Commissioner of Virginia, see Code, §§ 1155-1228, and Acts 1918, p. 458, amending § 1222, and Acts 1918, p. 483, amending § 1158, and Acts 1920, p. 547, amending §§ 1215-17. For act regulating the sale of bakery products, see Acts 1920, p. 576.

II. DRUGS

§ 6. Meaning of "drug."—By section 1662 of the Code: "The term 'drug' as used in this chapter shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or other animals."

§ 7. Adulteration.—An article is adulterated:—"(1) If, when a drug is sold under or by a name recognized in the United States Pharmacopoeia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the tests laid down in the United States Pharmacopoeia or National Formulary official at the time of investigation: provided, that no drug defined in the United States Pharmacopoeia or National Formulary, except preparations of opium shall be deemed to be adulterated under this provision, if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof,

although the standard may differ from that determined by the test laid down in the United States Pharmacopoeia or National Formulary, and any preparation of opium except laudanum, shall not be deemed to be adulterated, provided it does not differ from the standard of strength, quality or purity, as determined by the tests laid down in the United States Pharmacopoeia or National Formulary in any particular, save as to the amount and strength of alcohol contained in its menstruum, and said amount and strength of alcohol contained in its menstruum is plainly stated upon the bottle, box, or other container thereof.

“(2) If its strength or purity fall below the professed standard of quality under which it is sold.” (Code, § 1663.)

§ 8. Misbranding.—An article is misbranded: “(1) If it be an imitation of, or offered for sale under the name of, another article; or if it be so labeled or branded as to deceive or mislead the purchaser; or purport to be a foreign product when it is not so.

“(2) If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package without proper alteration of the original label, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or accentanilide, or any derivative or preparation of the said substances contained therein; provided, that nothing in this section shall be so construed as to require any article recognized in the United States Pharmacopoeia or National Formulary to be labeled as to its contents when such article conforms to the standard as laid down in the United States Pharmacopoeia or National Formulary and is labeled and sold or dispensed as such, or to require medicines dispensed on the prescriptions of lawfully authorized practitioners of medicine, dentistry or veterinary medicine to be labeled, except as directed by such practitioner.” (Code, § 1664.)

§ 9. Punishment.—To manufacture, sell, or offer for sale, any adulterated or misbranded drug, is punishable by a fine of \$20 to \$100, or jail not over 6 months, or both, and for each subsequent offense, the fine may be as much as \$200.

(Code, § 1657.) The punishment under Federal statute is that stated in section 4, above. The Board of Pharmacy has the drug examined or analyzed, and if it appears to be adulterated or misbranded, the party is notified and may be heard by the board, and if the party appears to be guilty, the facts with the examination or analysis of the drug is certified to the Commonwealth's attorney, for procedure by him. The sworn analysis or examination of the drug is *prima facie* evidence of the facts stated. (Code, §§ 1660-1.)

A guaranty obtained by a dealer from the wholesale jobber, manufacturer, or other party residing in the State, or in the United States, that the articles which he purchases from them are not adulterated or misbranded, shall protect the party making the sale. The guaranty must contain the name and address of the wholesaler, etc., who then becomes liable. (Code, § 1659.)

For further Federal provisions, see under section 4, above.

§ 10. As to sale of poisons, morphine, cocaine, etc.—See Code, §§ 1691-8.

§ 11. Pharmacy, practice of.—See Code, §§ 1655-1702, and Acts 1918, p. 428, affecting § 1693.

QUO WARRANTO

(See Burks' "Pleading & Practice" (new ed.).)

§ 1. Definition.—The writ of quo warranto (by what warrant or authority) is a writ for the Commonwealth against one who claims or usurps any office or franchise, to enquire by what authority he supports his claim, in order to decide the right and to dispossess him, if he holds without warrant of law. It also lies in case of non-user or long neglect of a franchise, or mis-use or abuse of it. (4 Min. Inst. 598.)

Information in nature of a writ of quo warranto, though in form a criminal proceeding, yet it is in substance a civil proceeding for the trial of a civil right (2 Va. Cas. 51; 116 Va. 48). For the statute as to such procedure, see § 5844.

§ 2. Statutory provisions.—See Code, §§ 5841-7. For writ against internal improvement company, see Code, § 3557; against corporation to forfeit charter for failure to file list of officers and directors, or to appoint attorney for service of process, § 3854; against fraternal benefit society, §§ 4297-8.

For venue, see Code, § 6052.

For jurisdiction in circuit courts, see Code, § 5890; Richmond courts, §§ 5922, 5928; Norfolk courts, § 5935; Roanoke courts, § 5947.

For appeals, see Code, §§ 6336-7.

RAILROADS AND RAILROAD COMPANIES

See Common Carrier; Corporations; Death by Wrongful Act; Employer and Employee

- § 1. Scope of subject
- § 2. Liability for injury to stock, etc., on track
- § 3. Cattle guard cases
- § 4. Spark arresters
- § 5. Liability for injury where signals not given
- § 6. Liability for death or injury to employee where no danger signal
- § 7. Liability for fire set out by engine or train
- § 8. Offenses against railroads
- § 9. Offenses by railroads
- § 10. Taxation of railroad companies
- § 11. Where suits brought against railroads
- § 12. On whom and how process or notice served
- § 13. Acknowledgments of writings by railroads
- § 14. Miscellaneous provisions

§ 1. Scope of subject.—The law as to the creation of railroads, and general law applicable to all corporations are given or cited under *Corporations*; while the law as to the transportation of passengers, goods, and live stock is given under *Common Carrier*. Killing persons on the track is given under *Death by Wrongful Act*, etc., and killing or injuring employees, under *Employer and Employee*, div. I., section 4.

§ 2. Liability for injury to stock, etc., on track.—By

the common law, a railroad company did not have to fence out trespassing animals, and was not liable for any injury to them, unless guilty of such negligence as would make it liable to any trespasser. But by statute a railroad is required to maintain lawful fences along its road-bed and maintain proper cattle-guards or (with the consent of the owner of the land) gates, or gates or bars in addition to the cattle-guard, if the company thinks necessary for safe-guarding life and property. But no fence need be built within a city or town or between the terminals of switches, or spur tracks, not over 300 yards from the depot, either way, nor where there is an embankment with sides sufficiently steep to prevent the passage of stock there; nor, as to stock killed or injured, where the company has compensated the owner for maintaining the necessary fencing. The company is not liable where the track is thus enclosed, unless the person or property was thereon by express permission of the company, or through the negligence of its employees, agents, or servants, or unless the injury was wilful or the result of gross negligence on the part of the company, its servants, agents, or employees. But where the track is not thus enclosed, the claimant for injury to stock or other property need not show that the injury was caused by the negligence of the company, its employees, agents, or servants. (Code, §§ 3946-9.)

For killing or injuring a person on the track, see *Death by Wrongful Act, etc.*, and *Torts*.

Whenever horses, cattle, or other stock or property is killed or injured on a railroad, not enclosed with fences and cattle-guards, the owner or company or either's agent or attorney may appoint a disinterested freeholder of the county or city as his appraiser, and notify the other (section foreman or station agent when the notice is to the company), who appoints a like appraiser, and the two select a third, and the board, after being sworn, examines and appraises the value and damage and make a written report to the clerk of the court. If the company fails for 60 days after the report is so returned to pay the owner the full amount assessed with costs thereof, the owner may sue for the injury; and if the jury allows an amount equal to or greater than the amount assessed, the court gives judgment therefor and

also for costs of suit and appraisement, and ten per cent. damages in addition thereto; and if he recovers less, judgment is rendered therefor and for costs of suit and appraisement; but if the company has offered to pay the amount assessed and the owner has refused, and he recovers a less amount, the costs of suit and appraisement is taxed against him. The appraisers receive each \$1.00, and the clerk 50 cents. (Code, §§ 3994-7.)

§ 3. Cattle-guard cases.—Where the railroad passes through enclosed lands, it must maintain proper cattle-guards where a fence is necessary, whether between contiguous farms or between different tracts, belonging to the same person, or along a public highway. Such cattle-guard is constructed on the request of the landowner in writing made to any section master or employee having charge at that point; failing for 10 days to do so, the owner may apply to the court for the appointment of three disinterested freeholders to decide if the cattle-guard shall be constructed; which decision they file in the clerk's office. If in the affirmative, the company must within 30 days thereafter construct the same, under penalty for failure of \$5 to the landowner for every day of such failure. Where fences have been erected, cattle-guards may be discontinued, except at public or private crossings, and in place of them the owners of lands connect their fences with the company's where they desire. In cattle-guard cases before a justice for the above penalties, either party can appeal to court, regardless of the amount in controversy. (Code, §§ 3950-1, 3954.)

§ 4. Spark arresters.—Company must provide an approved spark arrester under penalty of \$10 for each day's running. (Code, § 3952.)

§ 5. Liability for injury where signals not given.—Company must provide locomotive with bell and steam whistle, and the whistle must be sharply sounded outside incorporated cities and towns at least twice, at from 300 to 600 yards from a highway grade crossing, and such bell must be rung or whistle sounded continuously or alternately until arrival at such crossing, and must give such signals in cities and towns as they may require. In case of failure to give the said signals, a traveler on such highway injured or killed, or

whose property is injured by a collision on such crossing, may recover, even though he failed to exercise due care in approaching such crossing, but such failure may be considered in mitigation of damages. (Code, §§ 3958-9.)

An officer or employee whose duty it is to carry out any of the above provisions and who shall fail to do so is subject to a fine of not over \$10. (Code, § 3960.)

§ 6. Liability for death or injury to employee where no danger signal.—The company is required to provide for employees standing at their post of duty on the cars, proper danger signals at proper distances on each side of a bridge, tunnel, or structure not sufficiently high for them to pass thereunder with safety, and its failure makes it liable in damages for the death or injury of any such employee, resulting from the insufficient height of such bridge, tunnel, or structure, and no contract, express or implied, or no contributory negligence shall relieve the liability. (Code, § 3970.)

§ 7. Liability for fire set out by engine or train.—The company is liable for damage from fire occasioned by sparks or coals dropped or thrown from the engine or train, whether the fire originated on the company's right of way or not, and whether or not the engine has the proper spark arrester, and regardless of its condition. (Code, § 3992.)

The company has an insurable interest in property along its route and may insure itself against such damage by fire. (Code, § 4018.)

§ 8. Offenses against railroads.—See Code, § 4019 (switchlock keys); § 4428 (burning or destroying car); § 4439 (breaking into car); § 4449, as amended by Acts 1918, p. 485 (selling second-hand articles belonging to); § 4468 (injuring equipment); § 4474 (injuring switch lamp or other signal); § 4469 (being on track or leading or driving animal thereon); § 4475 (driving, etc., animal on track to get damages); §§ 4470-1 (trespassers on trains); § 4472 (removing packing from journal boxes); § 4473 (shooting or throwing stones or other missiles at train); § 4476 (destroying fences or cattle stop; § 4533 (riotous or disorderly conduct on cars etc.); § 4631 (drinking ardent spirits in station or car); § 4734 (standing wagon or vehicle on track).

§ 9. Offenses by railroads.—See Code, § 3960 (failure

to provide or use bell or whistle); § 4015 (violation of law as to caboose cars); § 3950 (failure to construct cattle-guard); § 4003 (violation of chapter 155 as to railroads); §§ 3938-9 (taking illegal rate or fee); § 3928 (failure to pay for loss or injury of goods); § 3973 (failure of duty as to depots, waiting room, and ticket office); § 3976 (failing to equip engine with headlight); § 4010 (violating law prohibiting excursions); § 3923 (failure as to transportation of explosives); § 1118 transporting unbranded or untagged fertilizers); § 1220 (allowing food to become contaminated in transit); § 3927 (failure to receive and receipt for freight); § 4032 (renting out tonnage of freight trains); §§ 911-12, 4006 (failure as to transportation of live stock); § 874 transporting uncertified nursery stock); § 3938 (failure to take up or set down passengers, or to receive, transport, or deliver property); § 3932 (failure to make repairs, additions, etc., ordered by State Corporation Commission); § 3960 (failure to give statutory signals); § 3952 (failure to provide spark arrestors); §§ 4001-3 (failure to obey or inform State Corporation Commission); § 3940 (failure to announce stations); § 4734 (obstructing free passage on street or road); §§ 4572, 4574 (transporting freight on Sunday); § 3945 (failure to maintain telegraph or telephone office); § 3945 (failure of duty of operators or dispatchers); § 1517 (using towels for common use); §§ 3940-1 (failure to announce or post notice of delayed trains); 3942 (failure in transporting troops); § 3964 (failure to provide separate cars for the races); § 3966 (conductor failing to assign races to proper car); Acts 1918, p. 452 (failure to clear right of way from brush and trees at grade crossings).

§ 10. Taxation of railroad companies.—See *Taxation and Tax Bill*.

§ 11. Where suits brought against railroad.— See *Corporation*, section 11.

§ 12. On whom and how process or notice served.— See *Corporations*, section 12.

§ 13. Acknowledgments of writings by railroads.—See *Corporations*, section 14.

§ 14. Miscellaneous provisions.—For miscellaneous sections of chapter (155) of Code as to railroads not given above,

nor under *Common Carrier or Corporations*, see §§ 3887, 3936, 3971 (connection of two or more railroads); § 3933 (lien for transportation charges); § 3942 (transportation of troops, etc.); § 3943 (telegraph and telephone lines); § 3952 (spark arresters); § 3953 (occupancy of pass or defile); § 3955 (foreign railroads to be chartered here); § 3957 (contracts to aid its business); § 3961 (real estate it may acquire); §§ 3972, 3999 (one road crossing another or a canal or water course); §§ 2006-8 3886, 3972-4, 3986-7; Acts 1918, p. 452 (grade crossings); § 3985 ("railroad crossing" boards); § 3976 (headlights); § 3988 (notice of accidents to be reported monthly to State Corporation Commission); § 3989 (air brake and block system); § 4005 (forwarding cars to destination); §§ 4008-10 (excursions prohibited when); § 4011 (connection with telephone exchanges); §§ 4012-17 (caboose cars); § 4019 (duplicate switch keys).

For general provisions as to public service corporations, see §§ 3881-3903, and Acts 1920, pp. 411, 20, amending §§ 3885, 3897, respectively; and the chapter as to transportation companies generally, see Code, §§ 3904-3935, and Acts 1920, pp. 234, 618, 20, amending §§ 3905, 3918, 3935, respectively. For other miscellaneous provisions, see Code, § 4379 (change of location); §§ 5189-90 (reservation lien on rolling stock); § 4379 (change of stations); §§ 4632-8, 4654, as amended by Acts 1918, p. 578 and Acts 1920, pp. 110, 593 (as to transportation, etc. of intoxicating liquors); §§ 1765-8 (drainage as affecting right of way); § 2006 (right of way along highway); §§ 4360-88 (power of eminent domain); § 4379 (abandonment of right of way or change of location); §§ 6426, 6438-9 (lien for labor and material); § 3720 (repairs and improvements compelled by State Corporation Commission); §§ 3738-40 (transportation of convicts, insane persons, etc.); §§ 3717-19, 3721, 3726, 3741 (examination, notice and laws furnished by State Corporation Commission).

For general acts since the Code, see Acts 1918, p. 225 (authorizing appropriation by cities to railroads); Acts 1918, p. 326 (authorizing counties to remit local taxes where operating at a loss—is this constitutional?); Acts 1918, p. 452 (to keep grade crossings clear of brush and trees); Acts 1918, p. 485—see § 4449 (selling second-hand articles belonging to);

RAPE

Acts 1918, p. 486 (prohibiting the use of public cups); Acts 1918, p. 637, and Acts 1920, p. 256 (w roads not included in "Workmen's Compensation Acts 1918, p. 683 (special tax upon railroad 1920, p. 620—see §§ 1818-20 (securing payment at regular intervals); Acts 1920, p. 400 (requiring suitable structures for employees engaged in making pairing cars, car trucks, or similar equipment); A p. 817 (when company to water live stock awaiting ment).

RAPE

See Attempts to Commit Crime

- § 1. The statute
- § 2. Analysis and explanation of the statute
 - (1) Rape of female of 15 years or more
 - (a) As to carnal knowledge
 - (b) As to force and against her will
 - (2) Rape of a child under 15, or of a lunatic or dumb, or blind pupil
 - (a) As to carnal knowledge
 - (b) As to force and against her will
- § 3. Ignorance no defense
- § 4. Proof of rape proper or carnal knowledge of a female
 - (1) As to rape proper
 - (2) As to carnal knowledge of such child or lunatic
 - (3) Depositions of female witnesses in cases of attempted rape
- § 5. Form of "description" in warrant or indictment

§ 1. *The statute.*—By section 4414, as amended Acts 1918, page 139: "If any person carnally know at fifteen years or more of age against her will, by carnally know a female child under that age or an inmate of any hospital for the insane, who has been a lunatic, or any female who is an inmate of a deaf or blind institution who is a pupil therein, he shall at the discretion of the jury, be punished with death or confinement in the penitentiary not less than five nor more than ten years. But, if such female child be over the age of

years and not an inmate of such hospital for the insane or institution, and consents to the carnal knowledge, the punishment shall be confinement in the penitentiary not less than five nor more than twenty years. If the carnal knowledge be with the consent of a female between the ages of fourteen and fifteen years, and the female be not an inmate of such hospital for the insane or of such institution, the subsequent marriage of the parties, with the written consent of both the parents if living or the living parent or guardian of the female, may be pleaded in bar of a prosecution for the offense."

§ 2. Analysis and explanation of the statute.—This section embraces three offenses: (1) Carnal knowledge with a female of the age of 15 or more, by force and against her will, which offense is rape proper; (2) carnal knowledge of a female child under that age; and (3) carnal knowledge with an adjudged female lunatic, inmate of a lunatic asylum, or a female inmate of a deaf, dumb or blind institution.

(1) *Rape of female of 15 years or more.*

(a) *As to carnal knowledge.*—Actual penetration (*res in re*) is requisite, but the least penetration is sufficient, though it do not rupture the hymen. Emission (*emissio seminis*) is not necessary.

(b) *As to force and against her will.*—As an ingredient of the crime, force is required, in order to show that the act was perpetrated against the woman's will, or what is the same thing without her consent. Hence, if she is violated during sleep (if that be possible) or while stupefied by inebriation, or in a fit (when consent cannot be presumed for want of resistance, the force necessarily incident to the act is enough to constitute it rape. But where a person imposes himself on a married woman by fraud, she believing him to be her husband and therefore consenting to the act, it is not rape. It does not mitigate the crime that the woman yielded her consent, if it was extorted by fear of death; nor that she consented after the fact; nor that she was a prostitute, or even the ravisher's concubine—although these last circumstances may tend to discredit her testimony. Neither does the fact of conception disprove force, and therefore indicate consent. Thus it is seen, to constitute this offense only two points must be established: (1) want of consent on the part

of the woman; and (2) penetration, howsoever little, both of which ought to be clearly proved.

(2) *Rape of a child under 15, or of a lunatic or a deaf, dumb, or blind pupil.*

(a) *As to carnal knowledge.*—The same principles applying as in the case of females of the age of 15 years or more.

(b) *As to force and against her will.*—This is not required by the statute, and hence consent or non-consent of such child or lunatic is immaterial, and the offense, though not properly rape, yet, in Virginia it is punished with the same penalty. (H's G. & M., p. 146.)

§ 3. *Ignorance no defense.*—It is no defense that the accused *bona fide* believed the girl to be 15 years of age or more, or was not informed that the female, of any age, had been adjudged a lunatic and is an inmate of a lunatic asylum, or a deaf, dumb or blind pupil. His conduct is at his own peril. (H's G. & M. p. 147.)

§ 4. *Proof of rape proper or carnal knowledge of a female.*—

(1) *As to rape proper.*—The woman is a competent witness, even against her own husband, if he assisted in the act, but credibility, as in other cases, is left to the jury. And her declarations out of court are evidence only so far as they are part of the *res gestæ*. General evidence of the prosecutrix's bad character for chastity may be given in evidence—e. g. to prove her a common prostitute or concubine, or that she had illicit intercourse with another person; but she cannot be asked whether she had carnal knowledge with any particular person, unless it be with the prisoner, and this she may be asked, of course. (H's G. & M., p. 147.)

(2) *As to carnal knowledge of such child or lunatic or pupil.*—The proof may be by the child, the lunatic or pupil herself, if she possess the requisite intelligence to understand the obligation of an oath, of which the judge must determine. (H's G. & M., p. 147.)

(3) *Depositions of female witnesses in cases of rape and attempted rape.*—See Code, § 4415.

§ 5. *Form of "description" in warrant or indictment.*—

NO. 1. RAPE OF A FEMALE OF THE AGE OF 15 YEARS OR MORE
 (Code, § 4414, as amended by Acts 1918, p. 139.)

DESCRIPTION:

"In and upon one E. F., she then being a female over the age of fifteen years, to-wit, of the age of ——— years, unlawfully did make an assault; and her the said E. F., then and there by force and violence, and against her will, feloniously did ravish and carnally know."

[Under this and the two following a conviction may be had for an assault.]

NO. 2. CARNAL KNOWLEDGE OF A CHILD UNDER 15 YEARS OF AGE
 (*Idem.*)

DESCRIPTION:

"In and upon one E. F., she then being a female child under the age of fifteen years, to-wit, of the age of ——— years, unlawfully did make an assault; and her the said E. E., then and there unlawfully and feloniously did carnally know and abuse."

[See note under preceding form.]

REAL ESTATE

See Adjoining Landowners; Adversary Possession; Conveyances; Curtesy; Deed of Trust; Delinquent Tax Sales; Dower; Easements; Fences; Fixtures; Justice of the Peace, div. III. (as to "Unlawful Detainer") and div. IV. (as to "Distress Warrant"); Landlord and Tenant; License (on lands); Liens of Mechanics and Others; Mortgage; Real Estate Agent; Recordation or Registry; Trusts and Trustees; Vendor's Lien

§ 1. What land or real estate includes

- (1) Generally
- (2) Fixtures
- (3) Trees, grass, etc., growing on the land; estovers
- (4) Cultivated, annual growing crops
- (5) Where tenant plants the crops; or emblements
- (6) Minerals and mines
- (7) Water and water rights

- (A) Surface streams
 - (a) Rights of upper as against lower proprietors
 - (b) Rights of lower as against upper proprietor
 - (c) Public or navigable waters
 - (d) Private or unnavigable waters
- (B) Subterranean Streams
- (C) Percolating waters
- (8) Ice
- (9) Petroleum oil and natural gas
- (10) Easements
- (11) License on lands
- (12) Land by accretion, alluvion, etc.; newly formed islands
- § 2. Various kinds of estates
 - (1) A fee-simple estate
 - (2) A qualified or base fee
 - (3) Fee conditional
 - (4) Fee tail
 - (5) Life estates
- § 3. Fee simple

§ 1. What land or real estate includes.—

(1) *Generally*.—Real property includes lands, tenements, and hereditaments. "Lands" include not only the earth's surface as, arable lands, meadows, pastures, woods, waters, and marshes, but also trees, crops growing, and all structures or buildings thereon, and everything fixed on it (see Fixtures); in short, everything belonging or attached to it above and below the surface, from the centre of the earth to the sky, thus including the minerals beneath and the space above.

So a landowner commits no wrong in cutting off limbs overhanging from another's land, but he is not the owner of the limbs, nor of the fruit thereon, even though the roots of the tree run into his soil, but these, it would seem, he may also cut off and eject for trespassing. Neither can one, without consent or compensation stretch telegraph or telephone wires over another's land; or shut off the light from above lighting a house below through a sky light.

"Messuage" is a particular kind of land, and means the dwelling, garden, and "curtilage" (i. e., the enclosure immediately surrounding and closely adjoining the dwelling and outbuildings).

"Tenements" is somewhat more comprehensive than "lands", as it includes also intangible, invisible rights in lands such as right of way or of drainage.

"Hereditaments" and "estates of inheritance" mean the same, and include lands and tenements and whatever else may be inherited or go to one's heirs (not to his personal representative), even though it be personal property, as an annuity given to one and his heirs, which passes to the heirs, and the "poor law" exemption (see Code, § 6562), which passes to the widow, minors and unmarried daughters absolutely. Hereditaments are either corporeal, as land, buildings, fixtures, growing trees, crops, etc., minerals, water, ice, oil and gas; or incorporeal, or intangible rights in lands not capable of manual possession, as, annuities, easements, etc., which are real property. (1 M's Real Prop., §§ 17-19, 65.)

By section 5, (10), of the Code, where used in a statute, "lands" and "real estate" mean the same, and include "lands, tenements, and hereditaments, and all rights thereto and interests therein, other than a chattel interest."

Sometimes, by the doctrine of equitable conversion (the court considering as done what ought to be done) as, where money is directed to be invested in land, or by statutory requirement (as in the case of the sale of infant's lands or of partitions—Code, § 5347), money passes as land. On the other hand, the proceeds of land directed to be sold, or land purchased with partnership funds, or shares of stock in a corporation (Code, § 3794), are personal property. (1 M's Real Prop., §§ 20-22.)

While buildings are generally a part of the land; otherwise where erected by the landowner's consent, but in case of sale of the land they must be removed; yet a purchaser of the land without notice of the arrangement, takes the buildings. A building erected on another's land (through ignorance of title or by mistake or otherwise), without his consent, belongs to the land without compensation therefor. On the other hand one may by contract or deed own a house or room on another's land, which is real estate. And a building erected on one's land from materials taken from another without his consent, is a part of the land, but the owner is liable for the materials; otherwise as to mere fixtures, which have not lost their identity. (1 M's Real Prop., § 23.)

(2) *Fixtures*.—See title *Fixtures*.

(3) *Trees, grass, etc., growing on the land; estovers*.—

Trees, grass, and other spontaneous growths requiring little or no periodical cultivation, are a part of the land. A tenant may use the mast or fruit of the trees, and the grass for pasture or hay; but he cannot cut down the trees, except sufficient for fuel, repairs, fences, etc. (called estovers). Trees, etc., are personal property when cut down or severed, or sold or mortgaged (after its maturity), or where the land is sold and timber excepted; and though a sale of growing trees, etc., makes them personalty; yet the sale is of such an interest in land as to require it to be in writing (Code, § 5561, cl. 6) unless by agreement the title is not to pass until the products have been severed. (1 M's Real Prop., § 42.)

(4) *Cultivated, annual growing crops.*—These, by conveyance, sale, mortgage or will of the land, pass with it; but a sale of ripe growing crops is a sale of personalty; if not ripe they are realty; ripe crops pass to the personal representative, while immature crops pass to the heirs. (1 M's Real Prop., § 43.)

By statute it is provided that no growing crop of any kind (not severed) can be levied on, except Indian corn after October 15th, and sweet and Irish potatoes over 5 barrels each after they have matured sufficiently to sever or market. (Code, § 2830.)

(5) *Where tenant plants the crops; or emblements.*—See *Landlord and Tenant*.

(6) *Minerals and mines.*—Minerals are solid rock or ore, which, while imbedded in the earth, are real estate, though when severed by one authorized to do so, they become personalty. The title to the surface may be in one person, and the minerals and mines in another. (1 M's Real Prop., § 51.) See, also, title *mines*.

(7) *Water and water rights.*—There are three classes of streams or waters to be considered:

(A) *Surface streams.*—In general each riparian proprietor (or landowner along a stream) is entitled to use the water and to have it flow in its customary way, and he cannot himself materially interfere therewith, as the other riparian owners have the same right; each may make such use thereof as he may choose, but he must not impair the equal rights of the others.

(a) *Rights of upper as against lower proprietors.*—Each has an equal natural right reasonably to appropriate the water for every useful purpose, domestic, agricultural, or manufacturing, provided its running is not materially diminished or changed or the waters polluted. An injunction lies for a possible future inquiry, if the upper proprietor invades the rights of the lower proprietor. One cannot divert the water to an artificial use, as, supplying a city or town with water. The right to use the water cannot be assigned to owners of property not bordering on the stream.

While pollution is not allowed, yet if it results from a reasonable use of the water, it is admissible, and one who purchases land lying upon a stream permanently polluted by sewerage, or with knowledge of such pollution, may nevertheless sue for damages. (1 M's Real Prop., §§ 53-56.)

(b) *Rights of lower as against upper proprietor.*—The lower proprietor has no right to obstruct the stream by dams, etc., causing the water to flow back and submerge the lands of the upper proprietors, or interfere with their mills or factories. An obstruction which causes no injury is not objectionable, and the fact that injury is caused thereby in times of extraordinary flood, such as is not reasonably to be looked for, is immaterial; otherwise, where the injury results from ordinary or periodical freshets. (1 M's Real Prop., § 57.) By statute, provision is made granting leave by court for building or raising dams, or cutting or enlarging a canal, for a water mill or other machine, manufactory, or engine, useful to the public, and for compensation therefor. (Code, §§ 3582-93.) But section 3593 specially provides that no such proceedings, nor any judgment thereon, shall bar any prosecution or action which could have been maintained if the said statutes had not been enacted, unless the same be "for an injury actually foreseen and estimated in such proceeding or judgment." And the court will enjoin the re-erection of a dam if the waters from stagnation would be injurious to the public. (4 L. 569.)

(c) *Public or navigable waters.*—A navigable or public stream is one capable of transporting the products of the country in masse, or upon which general commerce may be conducted; in other words, one navigable by vessels usually

employed in commerce (say, of 20 tons burden or more), and which communicates with other states or countries, whether the tide ebbs and flows therein or not and whether directly connected with the ocean or not; as, a stream floatable for logs or other product of field or forest at seasons recurring periodically with reasonable certainty, though not so floatable in its usual and continuous condition (106 Va. 176). All other waters are unnavigable and private. Navigable or public waters, and the beds underlying them belong to the State and are subject to its control—that is, they belong to all the people of the State in their sovereign capacity for their common use, the State being merely trustee for them. Hence the legislature cannot grant any good title thereto or to the rights therein to any private person, whether individual or corporation, yet it may lease to a citizen a portion of the bed for his private purposes, if it does not disturb an existing or contemplated use of a public stream; but in other respects the State has the right to control the navigation, and regulate the use of fisheries, oyster beds, wharves, landings, dams, etc. (Code, §§ 3573-4), provided it does not interfere with the exclusive right of Congress to regulate interstate commerce. By statute (§§ 3573-4), the public ownership on the one hand and the private ownership of lands lying on the stream, on the other hand, extends “to low water mark, but no further”; yet the private landowner has certain rights (as, to building wharves (§§ 1996, etc.), and of access to the water and of right of way over it) to the navigable channel. (1 M’s Real Prop., § 58.) And a city on an arm of the sea adjacent to tidal waters may use such waters for refuse and sewerage purposes, if it does not create a public nuisance, and any injury thereby to private oyster beds is without remedy. (119 Va. 95.)

(d) *Private or unnavigable waters.*—The beds of such streams belongs to the owner of the soil through which it flows; but if the banks are owned by different persons each owns *prima facie* to the middle of the stream, though that presumption may be rebutted by the terms of the deed or grant or the conveyance thereof to another. Where the boundary is described as running along or near a stream, though calling from point to point for monuments or marked

objects, with courses and distances indicated, it is presumed to mean to follow the meanderings of the stream, and the deed conveys the land to the middle of the stream. A grant of land bounded on a private stream, both sides or one being owned by the grantor, carries half of the bed of the stream, unless a contrary intent is manifest from the conveyance. In the case of a navigable stream, he owns and of course can convey only to low water mark. (1 M's Real Prop., § 60.)

(B) *Subterranean streams.*—These waters, when in sufficient volume to possess an appreciable value, and flowing in clearly defined and known channels—in mountain sections often flowing in great volume, furnishing power for machinery or supplying towns and settlements with water,—are governed by the same rules as surface waters. (1 M's Real Prop., § 61.)

(C) *Percolating Waters.*—These include not only waters that merely ooze, filtrate, or percolate through the soil, but also those that run in some quantity, but in undefined veins or channels. Such waters are generally treated merely as a part of the land like soil, rock or ore. If in digging for a well, for a foundation, for minerals, or for some other purpose, one disturbs, intercepts, or drains off the water in his neighbors well or spring collected therein from underground percolations, there is no remedy. But while a landowner, in the proper and reasonable enjoyment thereof may divert or intercept percolating water from his neighbors well or spring, he has no right to pollute it any way to the injury of the neighbor's water supply, as, in the case of a cesspool. (1 M's Real Prop., § 62.)

(8) *Ice.*—If the water is private property, it is a part of the realty until severance, and belongs to the owner of the bed; but ice formed on public waters belongs, it seems, to him who first appropriates it. (1 M's Real Prop., § 63.)

(9) *Petroleum oil and natural gas.*—These, like minerals, are a part of the land, and a lease or deed thereof with exclusive right to take them, transfers a part of the estate, not merely the right to them as profit or produce of the land; but owing to their fugitive nature, if they escape and go into other land or come under another's control, the former's title is lost; and if an adjoining or even a distant

owner drills his land and taps the gas or oil deposit so as to disturb or destroy the flow of oil or gas on another's land, the latter has no remedy. (1 M's Real Prop., § 64.)

(10) *Easements*.—See *Easements*.

(11) *License on lands*.—See *License (on Lands)*.

(12) *Land by accretion, alluvion etc.; newly formed islands*.—Accretion, is an addition to land by the action or erosion of water, producing changes of the water line, whether very gradually and imperceptibly, when it is called, alluvion, if an addition to the land, or reliction or dereliction, if a shrinking away of the water; or suddenly, as in case of a flood or freshet, when it is called avulsion, the identity of the land remaining notwithstanding its changed boundaries or altered location; if the addition be neither very gradual nor sudden, but intermediate, it is commonly called by the general name of accretion.

In the case of accretion, the addition belongs to the owner of the bed of the stream; while in the case of alluvion and also reliction, the soil belongs to the adjacent landowner, even though a corporation (100 Va. 82); in the case of avulsion, there is no change of ownership.

As to newly formed islands, if it occur by a sudden change in the course of a stream or its division into two beds, or by a sudden encroachment of the sea, etc., the soil remaining capable of identification, the ownership does not change; but if the island be gradually formed, it belongs to the owner of the bed of the stream, not to the adjoining landowners, unless they happen to own the bed upon which it is formed; and where the two banks belong to different owners, part of the island will belong to each. (1 M's Real Prop., §§ 1009-15.)

§ 2. Various kinds of estates.—Legally, an estate is the interest one has in lands. In respect of quantity or duration, estates are divided into freehold, and estates less than freehold or leaseholds. Leaseholds are estates of definite duration (except estates at will or by sufferance), and include estates for years, at will, by sufferance, from year to year, month to month, week to week, or for a year, month, week, etc. See div. IV. (as to "Unlawful Detainer," under title *Justice of the Peace*.)

Freehold estates are estates of indeterminate duration (except estates at will or by sufferance, which, though indeterminate, are leasehold estates). If capable of being inherited by heirs they are called estates of inheritance (as, the first four mentioned below); other estates, not of inheritance, are life estates.

Freehold estates are: (1) *A fee simple estate*, i. e., the entire and absolute property or interest which can be owned in land, and which is forever; (2) *a qualified or base fee*, i. e., an estate to a man and certain of his heirs at the time; (3) *fee conditional*, i. e., an estate conditioned on the grantee having heirs, when it becomes a fee simple; (4) *fee tail*, i. e., an estate to particular classes of heirs, which by statute (§ 5150) are converted into a fee simple; (5) *life estates*, which may be by act of the parties for the grantee's own life, for the life of another, or an estate not expressly for life, but which may last for life or may terminate sooner by the happening of some event, as, "a conveyance during marriage", or "until marriage," or "as long as Z resides abroad"; or by operation of law, a life estate may be an estate by the curtesy (see title *Curtsey*) or an estate in dower (see title *Dower*).

Estates, as respects the quality or qualifications of interest, are (1) *uses*, i. e., the right in one person (the beneficiary) to take the profits of land of which another holds the legal title and possession, which use the statute (§ 5155) converts into a legal estate; (2) *trusts*, i. e., uses not converted into legal estates under the statute (§ 5155) of uses, they being the same as uses before the statute, or trusts created by a court of equity—see *Trusts and Trustees*; (3) *conditions*, i. e. a qualification annexed to a conveyance of land whereby it is provided that in case a particular event does or does not happen or the grantee does or omits to do a particular act, an estate shall commence (when it is called a condition precedent) or be defeated (when it is called a condition subsequent); (4) *mortgage*—see *Mortgage*, section 1; (5) *deed of trust to secure a debt*—see *Deed of Trust*, section 1; (6) *vendor's lien*, i. e., a lien retained by the vendor or grantor, in the conveyance, for the payment of the purchase money or some part thereof (Code, § 5183); (7) *statutory liens of*

various kinds, as, of judgments or decrees, forthcoming bonds, attachments, *lis pendens* (i. e., a lien filed pending a suit), mechanic's lien, supply liens, etc.

Estates, as respects the time of enjoyment, are,—(1) *a remainder*, i. e., what is left of an entire grant of lands after a preceding part of the same estate has been disposed of, whose regular expiration the remainder must await, as where land is granted to one for, say, ten years, or for life, and then to another in fee simple, this latter estate being the remainder; (2) *a reversion*, i. e., the remnant of an estate continuing in the grantor, after the grant of an estate, say, for ten years or for life to another; and (3) *an executory limitation*, i. e., an estate, other than a remainder or reversion that takes effect in the future.

Estates, as respects common interests, are (1) *joint tenancy*, i. e., where lands are granted or willed to two or more persons, to hold in fee simple, for life, for years, or at will; (2) *tenancies by entireties*, i. e., an estate to husband and wife, which by statute (§ 5159) is converted into a joint tenancy or tenancy in common; (3) *tenancy in common*, i. e., where two or more hold undivided interests in the same land, under different titles, or under the same title, but at different periods, or conferred by words giving the grantees distinct shares; (4) *tenancy in coparcenary*, i. e., where lands of inheritance descend to two or more persons as joint heirs; and (5) *judicial partition* of common interests, the decree of partition itself without conveyance vesting the legal title in the co-owners (Code, § 5282); or the court may appoint a commissioner to make the conveyance (§ 6296).

§ 3. Fee simple.—For definition, see section 2, above. To create a fee simple estate it is no longer necessary to mention "heirs" in the conveyance, grant or will. (Code, § 5149.)

(4) *Life estate; incidents.*—As to life tenant's right to use trees, grass, etc., growing on the land (called "estovers"), see section 1, (3), above; as to fixtures, see *Fixtures*. Certain other incidents of a life estate are treated under *Landlord and Tenant*, as follows: Emblements, or the tenant's right to the away-going crops, see section 5, (10); waste, section 5, (11); repairs, section 5, (2).

It is the duty of a life tenant to pay the interest on encumbrances on the land. If the debt falls due during his life, he or she pays (the remainderman or reversioner pays the rest) only what would equal the present value of all annual payments of interests during the probable period of his or her life, with interest compounded, computed according to the mortality table as found in section 5131 of the Code. (1 M's Real Prop., § 217.)

The life tenant must also pay the yearly taxes; but assessments for local benefits, like the principal of an encumbrance, should be paid by the remainderman or reversioner. (1 M's Real. Prop., § 219.)

As to apportionment of rent upon the life tenant's death, in case of a sub-lease, see *Apportionment*.

An adult life tenant of real or personal property, where there is limited thereon any other estate, vested or contingent, and where, if vested, at least some of the remaindermen are incapable of giving their consent, may, if a sale is not prohibited by the writing creating the estate, file a bill in a court of equity to sell the whole fee simple or absolute estate, which the court will do if it appears his interests will be promoted and the rights of no other persons will be violated thereby. (Code, § 5161.) But question whether the statute in its present form is constitutional as to sale, at the instance of the life tenant, of the vested remainder of adult remainderman (see 123 Va. 268). The Revisors think it is—see note to § 5161. The remainder may be sold at their instance—see *Remainder* section 7.

As to how a life estate passes at death, by section 5383 of the Code, any estate for the life of another goes to the administrator or executor of the party entitled to the estate, and is assets in his hands, and is applied and distributed as the personal assets of such party.

For two prominent instances of life estates, see *Curtsey* and *Dower*.

REAL ESTATE AGENT OR BROKER

See Agents and Agency; Brokers

- § 1. Definition; his authority and power
- § 2. Commission
- § 3. License

§ 1. Definition; his authority and power.—A real estate agent or broker is one who negotiates the sale or purchase of real estate; but their powers do not generally extend to executing the sale, but merely to bringing the parties together, or to negotiate for the contract. His business generally is to find a purchaser who is willing to buy on the terms fixed by the owner. He has no implied authority to bind his principal by signing a contract of sale. Nor has he such authority to fix the terms of sale, time of possession, nor the covenants to be contained in the deed. He cannot materially change the terms of sale fixed by the principal without his consent. He is a special agent and must pursue his instructions and act within the scope of his limited power; and those who deal with him, if he exceeds his authority, do so at their peril. A real estate agent authorized to "list" and "place" property on commission has no authority to sign a contract of sale. The owner of land cannot verbally authorize an agent to make a valid written contract for the sale of it (Chatham's case, 24 S. E. 61; but see Davis' case 87 Va. 559, and 9 Leigh 387). But where an agent is authorized by writing to sell land, he has authority to enter into such written agreement as may be necessary for that purpose; for the authority to sell implies an authority to do everything necessary to complete the sale and make it binding. So he may receive the cash payment. (2 Rand. 6; 9 Leigh, 387; 82 Va. 657, 664, 808; 88 Va. 411, 414, 456; 92 Va. 581.)

§ 2. Commission.—A real estate broker or agent to be entitled to compensation must complete the sale. He must find a purchaser in a situation ready and willing to complete the purchase upon the terms agreed upon, before he is entitled to commission. When he has found such a purchaser who has entered into a valid contract, his right to compensation cannot be defeated by the fault of the seller, by his

misrepresentations, or by his whimsical or unreasonable refusal to comply with his contract (98 Va. 344).

"A broker is usually employed upon a contingent fee. Whether he has earned his fee or not depends on the terms of his employment. A broker may be employed to sell upon certain terms, or he may not have authority to propose any terms, but simply undertakes to find a buyer or purchaser. Thus P, who desires to sell a piece of real estate, may ask A to secure a purchaser for him. A finds that C is desiring to buy a lot in that vicinity, and C expresses himself as willing to buy P's lot if satisfactory terms can be arranged. So far A has earned no fee. If P sees fit to withdraw or if P and C cannot agree on terms, A cannot complain, because he was never empowered to submit any certain terms. If, however, P does sell to C, whom A has secured, A is entitled to a commission, although P may have carried on all the negotiations himself and dispensed with A's services in order to deprive A of his fee. If, on the other hand, P employs A to find a purchaser to buy on certain terms and A finds a purchaser who is willing to buy on those terms, then inasmuch as A has done his part, he is entitled to his fee whether P enters into a contract with C, or refuses to do so. But even in this case, P might revoke A's authority at any time before he finds the purchaser, without becoming liable to A unless P and A had contracted for a certain definite period. Merely naming a definite period is not sufficient to constitute a valid contract. There must be a consideration to support the agreement. Even then there may be revocation, but if that revocation is a breach of contract, the broker would be entitled to damages." (Bays' Am. Com. Law, § 85.)

§ 3. License.—A real estate agent, called "a land agent," is required, under penalty of \$100 to \$500 for each offense, to obtain a license as such, which costs in towns not over 2,000, \$10 and 12½ cents on each \$100 of amount of sales; if in a town of 2,000 to 3,000, \$10 more, or if 3,000 to 4,000, \$20 more, or 4,000 to 5,000, \$30 more; or if in a city of 5,000 or more, \$40 more. Where a firm, the tax is on the firm and not each member (Acts 1915, p. 232; 2 Code 1919, p. 3127. §§ 54, 55).

§ 4. Useful forms under "Real Estate Agent."—[The

following forms are made up from forms successfully used for the past 20 years by W. D. Hill & Company, Real Estate Agents and Auctioneers, South Boston, Va.]

No. 1. CARD LISTING CITY OR TOWN PROPERTY WITH REAL ESTATE AGENT

I own lot No. ———, block No. ———. (or lot at street and house No. ———);—rooms in house: ———. Water (city, cistern, or well): ———. Other improvements: ———

I will sell same for \$———, and will allow W. D. H. & Company, South Boston, Va., 5 per cent. commission for negotiating sale. Date _____, 192—. (Signed) _____

No. 2. CONTRACT LISTING PROPERTY AND AUTHORIZING AGENT TO SIGN CONTRACT OF SALE

I hereby place my property containing ——— acres more or less, _____
 and situated and described as follows: _____

in your hands for sale. And I hereby authorize and empower W. D. Hill and Company, South Boston, Va., to sell said property upon the terms hereinafter set out, and to enter into and execute all necessary contracts with the purchaser to carry out said sale and to sign my name to said contract of sale as my agent. I agree to accept for said property the sum of ——— dollars (\$———), terms to be cash or not less than one-third cash, the balance in three equal instalments payable at or on or before 1, 2 and 3 years from date of sale respectively, the deferred payments bearing interest from the day of sale at the rate of six per cent. per annum, and to be secured by deed of trust on the entire property, or at such smaller price as may be acceptable to me.

And in consideration of the services to be performed by the said W. D. Hill & Company, in effecting a sale of property, I agree, if said property is sold by them, or through their influence or introduction, to pay them 10 per cent. ——— of the selling price as their commissions or compensation for such service, said commission to be paid from ——— payment of the purchaser.

This agreement is to be in force and binding on me until I shall have given you 15 days written notice of the sale, transfer or withdrawal of the property. But this notice shall be void and the contract in full force, should I sell the said farm to any one whose attention, as a purchaser, has been called to said property. previous to such withdrawal.

I agree in the event of sale of said property, to furnish the pur-

chaser an abstract of title showing said property clear of liens, and encumbrances, and a deed to said property with general warranty signed and acknowledged by myself and my wife (if married).

I agree if the above property is sold at the price of \$—— net to me, that I will allow to the said W. D. Hill & Company, as their commission and compensation for selling the said property, all of the purchase money received for said property over and above the said sum of \$—— net to me. This —— day of ——, 192—.

(SEAL)

(SEAL)

No. 3. CONTRACT FOR AUCTION SALE OF LAND DIVIDED UP INTO PARCELS

This agreement made and entered into this the —— day of ——, 192—, by and between A. B., B. C., and C. D., —— county, of Virginia, parties of the first part, and W. D. Hill & Company, —— county, Virginia, party of the second part ——.

WITNESSETH: That for and in consideration of the sum of one dollar (\$1.00) paid by the parties of the second part, the receipt whereof is hereby acknowledged, and for the further consideration hereinafter mentioned, the party of the second part does hereby agree to offer for sale, and exclusive sale from party of the first part for —— days from this date that certain lot, tract, or parcel of land situate in County of ——, Virginia, —— and containing —— acres, more or less, and more fully described as follows, to-wit: [Here describe the property]; upon the following terms and conditions.

FIRST. That parties of the first part do agree to put the said land in first-class shape for sale by doing all surveying, subdividing, and having not less than —— blue-prints made, and such other work as may be necessary for the conduct of the sale, the same to be at the expense of the party of the first part.

SECOND. The party of the second part does agree to furnish. [Here state what] on the day of the property is offered for sale, also advertise for sale the land mentioned herein in a thorough, and business-like manner by doing all newspaper work, handbills, cloth signs, personal letters, etc., as they may deem necessary in order to cause prospective buyers to attend at the time and place advertised. They also agree to furnish at the time and place advertised all prizes that they may deem necessary to be given away to induce prospective buyers to attend thereat, and induce them to stay close to the auctioneer, and furnish A. C., auctioneer to cry the sale, ground men to mingle with the crowd, showing the maps, and the strong points of the property being offered for sale, and causing prospective buyers to bid on same, also a clerk to keep an accurate account of all property sold, and all other help necessary to conduct a sale in a rapid and business-like manner.

THIRD. For which service the parties of the first part agrees to pay to the party of the second part a commission of ten per cent. for any sale or sales of any part or all of the property that may be sold

by the party of the second part, and confirmed by the parties of the first part, regardless of any clause in this contract, or any subsequent agreement.

FOURTH. The price named by the parties of the first part shall not exceed \$——, exclusive of a commission of ten per cent. on any and all sales confirmed.

FIFTH. It is agreed that when the property has been sold, should the price exceed the sum of ——, that any and all sums over that amount shall be considered an overage and shall be divided, —— to the party of the first, and —— to the party of the second part.

SIXTH. It is agreed that whereas the party of the second part will be put to a great deal of expense in advertising and selling this property therefore the parties of the first part agrees to sell, confirm or pay a sufficient amount to cover the actual expense of said sale not to exceed the sum of \$——.

SEVENTH. It is agreed that the sale shall be upon the terms of \$—— cash and balance —— [state terms], with six per cent. interest. The deferred payments to be secured by a vendor's lien or deed of trust on the property of each purchaser, and party of the first part to make a good and sufficient deed with general warranty to all purchasers, and to furnish abstract of title to said property if required.

Given under our hand this the —— day of ——, 192—.

A. B.

B. C.

C. D.

W. D. H. & Co.

NO. 4. LETTER-CONTRACT FOR AUCTION SALE OF LAND, DIVIDED INTO PARCELS

South Boston, Va., ——, 192—.

Mr. A.-B.,
Chatham, Va.

Dear Sir:

With reference to the sale of your property situated (state where). containing —— acres, we are willing to sell same for you "The Auction Way" or privately, after it has been subdivided, at sometime to be mutually agreed on between us, on the following terms, to-wit:

FIRST: You are to have the property surveyed and subdivided, blue prints made, record plat and all deeds of trust which is to be at your cost and expense.

SECOND: We agree to advertise the sale of the property in a thorough and business-like manner through the employment of placards, circulars, cloth signs, mailing lists and other methods, furnish two auctioneers; ground men to mingle with the crowd; a clerk to keep an accurate record of all sales made, prepare deeds, deeds of trust and notes; and a statement showing all sales and deliver to you all monies, notes and other evidences of debt, all of which is to be at our cost and expense.

THIRD: Before the auction sale a schedule of prices is to be made

out on the various tracts, which schedule we will maintain as far as possible, same not to exceed \$——.

FOURTH: For our services you agree to pay us a commission of ten per cent. on any public or private sale or sales, made by us and confirmed by you.

FIFTH: You guarantee that our commissions shall amount to at least \$——.

SIXTH: Terms of sale one-third cash, the balance in one, two and three years, secured by deeds of trust on each purchase, or such other terms as may be agreed on.

SEVENTH: You agree to allow us sixty days after the sale to dispose of any unsold portions of the property at a price in accordance with the schedule of prices herein referred to.

If the above is agreeable to you kindly sign the acceptance clause below, keeping one copy and returning one to us and this will act as a contract between us for the purposes mentioned.

Yours very truly,

W. D. H. & Co.

The above conditions and terms are hereby accepted, this the —— day of ——, 192——.

A. B.

No. 5. OPTION CONTRACT FOR PURCHASE OF LAND

[See No. 4, under *Contracts*.]

RE-CAPTURE OF PROPERTY OR PERSON

See, also, *Arrest; Assault and Battery; Manslaughter*.

Where one has deprived another unlawfully of his goods, or wrongfully detains his wife, child, or servant, the party aggrieved may lawfully claim and retain wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace. The reason for allowing this self-redress is obvious, for otherwise it might be impossible to obtain redress at all. His goods may be afterwards conveyed away or destroyed, and his wife, child, or servant concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of the law. But as the public peace is a superior consideration to any one

man's private property or individual rights; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, and the strong give law to the weak; for these reasons this right of re-capture is never to be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, I may lawfully seize him in a highway or public inn, provided I commit no breach of the peace in so doing; but I cannot dispossess the wrong-doer by force, nor break open a private stable, nor even invade a stranger's grounds to take him, except he be feloniously stolen, but must have recourse to an action at law. (4 Min. Inst. 119-20.)

RECEIPT

(Hawkins' Legal Counselor, pp. 534-5.)

- § 1. Receipts as evidence in general
- § 2. Receipts in deeds
- § 3. Separate receipts under seal conclusive
- § 4. Officer's receipt
- § 5. Receipt where debt paid by check, note, etc., which is not paid
- § 6. Form of "Receipt"

§ 1. **Receipts as evidence in general.**—A receipt may be used as evidence against one just as any other declaration or admission. A simple receipt not under seal is presumptive evidence only and may be rebutted or explained by other evidence of mistake in giving it, or of non-payment or of the circumstances under which it was given. A receipt expressed to be in full or in full of all accounts or of all demands is of a much more conclusive character, because it furnishes evidence of mutual compromise and settlement of the claim of the parties, and such a receipt will often operate to extinguish a claim although the creditor may be able to show he did not receive all that was due him, for where parties after consideration mutually agree upon a balance between them even if there be honest dispute about

the account they will be bound by it, and a receipt in full given with a knowledge of the circumstances or with apparent intent to settle in full will be evidence of full satisfaction. Nevertheless such a receipt even may be overcome by proof of fraud or misrepresentation, or ignorance of fact, or such mistake as enters into and vitiates the compromise, showing that in fact no intended and valid compromise was made, or by evidence of the taking of an unconscionable advantage.

§ 2. Receipts in deeds.—As to receipts in deeds for purchase money, generally the seller and persons claiming under him are estopped from denying that the consideration therein mentioned was given or passed, so far as attempting to defeat the conveyance goes, but in a suit for the recovery of the purchase money, or in an action to recover a debt which was in fact paid by the conveyance, or in an action for a breach of a covenant in the deed or the like, the grantor may show that the consideration was not in fact paid or that a consideration in addition to that mentioned in the deed was to be paid; also where the deed is attacked for fraud or is impeached by creditors as being without consideration and fraudulent against them and therefore void, or where it is the purpose to show the conveyance to be otherwise illegal, the receipt may be explained or contradicted.

§ 3. Separate receipts under seal conclusive.—Receipts under seal, however, where they are not merely a part of a sealed instrument designed to have some other effect than that of a mere receipt, are conclusive to the same extent as other specialties or instruments under seal, and are impeachable only for fraud or mistake of a material fact. A receipt embodying a contract is not open to the explanation or contradiction permitted in the case of a simple receipt, as for example where one receipts for money and in the same instrument follows this by a statement that it is in payment for certain goods to be delivered, this being in the nature of a written contract which is not ordinarily open to explanation by verbal evidence. (See *Contract*.) A bill of lading which is a receipt for goods delivered to a carrier for shipment is an exception to this rule, for such a receipt may be explained by other evidence, and it may be shown by verbal

testimony that the things actually received were not as receipted for. This is due no doubt to the impracticability of examining and counting articles offered for shipment in every instance. The part of the contract in a bill of lading, however, which consists of an undertaking to transport the goods can not be varied by verbal evidence.

§ 4. Officer's receipt.—Where goods have been attached or levied on under execution, the officer attaching under the practice in some places frequently delivers them to a third person, and takes a receipt therefor upon agreement to redeliver to the officer upon demand. The receiptor in such case can not afterwards deny that the attachment was made or that it was insufficient or illegal. Nor can he deny that the property was that of the debtor except in mitigation of damages where he is sued for non-delivery. (See, also, *Sheriffs, Sergeants, etc.*)

§ 5. Receipt where debt paid by check, note, etc., which is not paid.—Where a check, or negotiable instrument is given for an indebtedness or check is given for an indebtedness it is presumed to have been accepted on the condition that it shall not work a discharge of the demand until paid, and if a receipt in such case be given which is silent as to the fact that it was a check or negotiable instrument which was actually received, the effect of the receipt may be overcome by proof that the payment admitted was in fact by an instrument which was not good or which has not been paid, in which case the original indebtedness will still exist. The extinguishment of the original indebtedness by delivery of the check or new obligation and giving a receipt for the amount thereof, is not to be presumed unless it be shown that such was the intent of the parties.

§ 6. Form of "Receipt."—

_____, Va., _____, 192—.

Received from C. C. \$_____, in full of account to date (or "in full of all demands"; or "in full for a horse (or other thing) this day sold and delivered to him" or "sold and delivered to him on the _____ day of _____, 192—"); or

Received from C. C. his sixty day negotiable note in our favor dated _____, 192—, or \$_____, in full of all demands, when paid; (or "in part payment of balance due me"; or "in full for account rendered _____, 192—"; or "in full for bill of _____, 192—," or as the case may be); or

Received ten cows, six horses (or other stock), which I have promised to keep through the winter and feed with good fodder and hay, etc., and return in good condition ———, 192—, casualties excepted, he paying \$10 each. Witness my hand and seal. A. B.

RECEIVERS

§ 1. **When collection of money larceny.**—Collection of money by a receiver before giving bond and failure to account for the same is larceny. (Code, § 6273.)

§ 2. **Proceedings by rule against.**—See Code, §§ 6274-7.

§ 3. **General receivers.**—See Code, §§ 6280-91, 6294-5.

§ 4. **Suits against receivers.**—See Code, §§ 6291-3.

RECORDATION OR REGISTRY

(For the "Torrens System" of registry, etc., see Code, § 5225, continuing in force Acts 1916, pp. 70, 558, as amended by Acts 1918, p. 629, and Acts 1922, amended § 89.)

§ 1. **Recordation not necessary as between the parties**

§ 2. **Object of recordation**

§ 3. **What writings and liens are recordable, and effect of recordation**

§ 4. **Where writings and liens to be recorded or docketed**

§ 5. **In what books writings and liens are recorded or docketed**

(1) Deed Book

(2) Miscellaneous Lien Book

(3) Bond Book

(4) Will Book

(5) Judgment Docket

(6) Marriage Register

(7) "Writings Partially Proved" Book

(8) Conditional Lien Book

(9) Crop Lien Book

(10) Mutual Assurance Society's Lien Book

(11) Federal Farm Loan Mortgage Book

(12) Plat Book

§ 6. **Acknowledgment or proof of writings for recordation**

- § 7. Priority of writings admitted to record the same day
- § 8. State tax and clerk's fees for recording writings and liens
 - (1) State tax
 - (2) Clerk's fees
 - (3) Examples
- § 9. Useful tables of fees for recording or docketing writings or liens

§ 1. Recordation not necessary as between the parties.—As between the parties to the transaction, recordation is not necessary, unless in the single case of a tax deed—see *Delinquent Tax Sale*, section 18.

§ 2. Object of recordation.—The object of recordation is to give notice to third persons, viz., in some cases to subsequent purchasers for value and without notice, and in others to those and creditors.

Not recording, it should be observed, in no degree affects the validity of a conveyance or writing as to parties thereto, their heirs and devisees, or as to purchaser without valuable consideration, and also as to purchasers for valuable consideration, but with notice; for the registration is only designed for the acquaintance of third persons or strangers with the existence of the writing, and for the preservation thereof. Also it is convenient to get a certified copy at any time to be used as evidence. If the writing is not acknowledged it may after 6 months, upon direction of any one interested, be recorded for preservation (Code, § 5213).

§ 3. What writings and liens are recordable, and effect of recordation.—Recordation is to give notice to third persons. Various writings and liens are required to be recorded or docketed, with varying effect as to purchasers and creditors.

The following are governed by the same statutes (§§ 5192-5201, and Acts 1922, amending § 5194):

Deeds of conveyance (see *Conveyances*, section 14); deeds of trust (see *Deeds of Trust*, sections 9 and 10); mortgages (see *Mortgage*, section 9); bills of sale (see *Bill of Sale*, section 2); and contracts for the sale of real estate, or for the lease thereof for more than 5 years, and contracts in respect to real estate or goods and chattels, in consideration of marriage, or contracts for the sale of goods and chattels (see *Contracts*).

Any loan of goods and chattels where the possession remains with the loanee for five years, or any deed or disposition of goods and chattels to take effect in the future where the possession remains in another for 5 years, is "void as to creditors of and purchasers from the person so remaining in possession." (Code, § 5188.)

A power of attorney, until recorded, is void, it would seem, as to creditors and purchasers without notice (Code, § 5203).

As to partitions of land, assignments of dower therein, and judgments or decrees for land, it seems their recordation is good as against both purchasers and creditors, though not so stated (Code, § 5216).

Attachments against the real estate of a non-resident, until recorded, are void as to "subsequent *bona fide* purchasers of real or personal estate for valuable consideration and without actual notice" (Code, § 6469).

Notices of Federal tax liens under section 3186 of the Revised Statutes are to be filed with the clerks of State courts and recorded—Acts 1922.

Written acts of re-entry upon land for condition broken, when recorded, are declared evidence, "in all cases, of the facts therein set forth" (Code, § 5536).

For the rule as to liens of mechanics, supply men, and laborers, see *Liens of Mechanics and Others*, sections 3, 4, 5, and 7; a *lis pendens*, i. e., a lien filed when suit is brought, to obtain a lien on real estate involved in the suit, see *Lis Pendens*, section 1; any conditional sale of personal property or reservation of title thereto or lien thereon, see *Conditional Sale or Reservation Title or Lien*, section 1; judgments, decrees or orders for the payment of money, see *Judgments*, section 7; lien for the get of a colt or calf, see *Liens of Mechanics and Others*, section 24; crop lien for advances made during the year to farmers (crop lien for advances to tenants and laborers, need not be recorded)—see *Liens of Mechanics and Others*, sections 26 and 27; lien against commission merchant, see *Liens of Mechanics and Others*, see section 25. For the recordation of plats sub-dividing land within a city of over 30,000, or within 10 miles thereof, into 3 or more parts for laying out a town or city, or addition thereto, etc., see Acts 1922, p. —.

"Creditors," unless otherwise indicated by the context, are not creditors in the popular sense, but lien creditors, i. e., those who have liens imposed by law, as, a judgment, attachment, recognizance, forfeited forthcoming bond, or an execution (as to personal property); while a creditor by contract, as, by deed of trust or mortgage, reservation and crop lien (as to personal property), etc., is not a creditor, but in law is considered a purchaser. For "creditor" in the broad and popular sense of general creditors as well as lien creditors, see *Fraudulent and Voluntary Conveyances*, sections 3 and 4.

"Purchasers," under the registry laws, are not only one who has bought and has a contract or deed, but also, as just stated, one who has obtained by contract a lien, as, by deed of trust, mortgage, reservation lien, crop lien, or the like. See the different subjects cited above, especially *Conveyances*, section 14.

§ 4. Where writings and liens to be recorded or docketed.—The writings, enumerated in section 3, above, are required to be recorded in the clerk's office of the county or city wherein the real estate or the goods and chattels embraced thereby may be, and this is true, even though the property on which there is a lien in another state is removed to this State; and if such property be in more than one county or corporation, the registration must be in each one in order to be valid as to so much as shall be therein; but a judgment, decree or order requiring the payment of money or a power of attorney, may, at one's pleasure, be recorded in any county or corporation; and a deed releasing a deed of trust, in whole or part, may be recorded either where the property released is located or where it was when the deed of trust was recorded; and when personal property embraced in the first group of cases under section 3, above, is removed into another county or corporation than that in which the writing relating thereto is recorded, such writing, if recorded therein within one year, takes effect from the time of such removal; otherwise, from the time of such new registry, but reserving to minors and insane persons, for such registry, one year after the removal of his or her disability (Code, § 5196); furthermore, if the original be lost, a copy from one clerk's office may be re-

ministrators, trustees, or other fiduciaries, shall be recorded in a book to be known as the 'Will Book'; provided that the judges of the several courts in the Commonwealth, before whom fiduciaries are required to qualify, may, by an order entered either in term or in vacation, prescribe that inventories, appraisements, accounts of sale and settlements of accounts of fiduciaries, together with all reports and decrees or orders or portions thereof proper to be recorded therewith, shall be recorded either in the 'Current Will Book' or in a book to be kept by the clerk for that purpose as to such judge may seem proper."

(5) *Judgment Docket*.—By section 3393 of the Code, as amended by Acts 1920, p. 828: "Abstracts of all judgments authorized or required by law to be docketed or recorded and abstracts of all executions issued on any judgment shall be recorded in a book to be known as the 'Judgment Docket'."

(6) *Marriage Register*.—By section 3393 of the Code, as amended by Acts 1920, p. 828: "All matters relating to marriages required or authorized to be recorded under sections 5075-7, shall be recorded in a book to be known as the 'Marriage Register'."

(7) *"Writings Partially Proved" Book*.—"All deeds and other instruments which have been only partially proved shall be recorded in a separate book to be known as 'Writings Partially Proved'."

(8) *Conditional Lien Book*.—For conditional sales or reservation of titles or liens to or on personal property (Code, § 5189, as amended by Acts 1920, p. 398).

(9) *Crop Lien Book*.—For crop liens for advances to farmers (Code, § 6452, as amended by Acts 1920, p. 339).

(10) *Mutual Assurance Society's Lien Book*.—See Code, § 6458.

(11) *Federal Farm Loan Mortgage Book*.—See Acts 1918, p. 437.

(12) *Plat Book*.—See Code, §§ 5217-18; Acts 1918, pp. 504, 765.

The law also requires to be kept in every clerk's office an easily used (when once informed) general index to all Deed Books, Miscellaneous Lien Books, Will Books, Judgment

Dockets, and Court Order Books; and in lieu of daily entries in the separate books and in the general indexes, of deeds of conveyances, deeds of trust, or other documents conveying or affecting the title to real estate, the court may direct the clerk to keep a "Daily Index of Receipts of Deeds for Recordation," which should always be asked for in examination of titles (Code, § 3394, as amended by Acts 1920, p. 105).

§ 6. Acknowledgment or proof of writings for recordation.—Writings may be authenticated for registry by acknowledgment or proof of two witnesses before the court, its clerk or his deputy, in his office, or upon certificates of acknowledgments by certain officers—see *Acknowledgments*.

§ 7. Priority of writings admitted to record the same day.—Writings embracing the same property and admitted to record in same county or city on the same day, the first admitted has priority (Code, § 5198).

§ 8. State tax and clerk's fees for recording writings and liens.—Every writing admitted to record or required to be docketed, shall, with all certificates, plats, schedules, and other papers thereto annexed or thereon endorsed, be recorded or docketed by or under the direction of the clerk, and after it has been recorded the original may be delivered to the party entitled to claim under the same. The charge for recordation is made up of a state tax (which goes to the State) and the clerk's fees, both of which are to be paid in advance (Code, § 2403; § 3484, as amended by Acts 1920, p. 800).

(1) *State tax.*—The State tax on "a deed is 10 cents on each \$100 or fraction thereof, but where, in the case of a lease for a term of years, the annual rental multiplied by the term equals or exceeds the actual value of the property, the tax is based upon the actual value. The tax on a contract relating to real or personal property," as, a contract for the sale of land, or a bill of sale of personal property, is 50 cents; but if the consideration of the deed or the actual value of the property conveyed exceeds \$300 and not more than \$1,000 it is \$1.00; and where the same exceeds \$1,000 there is added 10 cents per \$100 or fraction thereof; provided, the tax on a deed of release or of partition shall be only 50 cents; and on a deed of trust or mortgage the tax is to be assessed upon the amount of "bonds or other obliga-

tions" secured thereby. But the tax is not to be charged for a supplementary writing to a deed of trust, etc.—see under No. 2, section 9. The tax on a contract as to rolling stock or equipment of a railroad, etc., is 10 cents per \$100 or fraction thereof, of amount contracted for. (Code, 1919, p. 3087, § 13 as amended by Acts 1922.)

There is no State tax on a homestead declaration or a conditional sale or reservation title or lien to or on personal property, it not being considered "a deed" or a "contract relating to personal property."

The State tax on the probate of a will or grant of administration is \$1.00; but where the value of the estate is over \$1,000, the tax is ten cents for every additional \$100 or fraction thereof. (Acts 1914, p. 487; 2 Code, 1919, p. 3087, § 12, as amended by Acts 1922.)

In every case the tax must be paid before the writing is recorded. (Code, § 2403.)

(2) *Clerk's fees.*—Unless otherwise specifically provided (see (3), (4), and others of No. 3, under section 9, below), where a deed of conveyance, deed of trust, or other deed, a will, contract or writing, admitted to record in the Deed Book, Will Book, Miscellaneous Lien Book or Marriage Register, under chapter 132 (see § 3392, and § 3393 as amended by Acts 1920, p. 313, as to duty of clerk in recording writings, and in what books recorded), chapter 210 (as to "unrecord writings"), and chapter 211 (as to "record of deeds and other writings"), for everything relating to it, except the recording in the proper book, the clerk's fees in addition to the State tax, are as follows:

"For receiving proof of acknowledgments, entering orders, endorsing clerk's certificate, and where required embracing it in list for commissioners of the revenue," 50 cents.

"For recording in the proper book such writing, and all matter therewith (except plats), or for recording anything not otherwise provided for," 3 cents for every 20 words; or in lieu thereof the clerk may charge the following specific fees:

"Where the writing is a deed of trust or mortgage, or is a conveyance of real or personal estate," his fee is \$1.00; [If some other writing, as, a contract, homestead declaration,

Not over \$600 to \$700.....	\$2.20
Not over \$700 to \$800.....	2.30
Not over \$800 to \$900.....	2.40
Not over \$900 to \$1000.....	2.50
Not over \$1000 to \$1100.....	2.60
Not over \$1100 to \$1200.....	2.70
Not over \$1200 to \$1300.....	2.80
Not over \$1300 to \$1400.....	2.90
Not over \$1400 to \$1500.....	3.00
Not over \$1500 to \$1600.....	3.10
Not over \$1600 to \$1700.....	3.20
Not over \$1700 to \$1800.....	3.30
Not over \$1800 to \$1900.....	3.40
Not over \$1900 to \$2000.....	3.50
Over \$2000 to \$ 3000— 3.50+10c for each \$100 or fraction over \$2000	
Over \$3000 to \$ 4000— 4.50+10c for each \$100 or fraction over \$4000	
Over \$4000 to \$ 5000— 5.50+10c for each \$100 or fraction over \$4000	
Over \$5000 to \$ 6000— 6.50+10c for each \$100 or fraction over \$5000	
Over \$6000 to \$ 7000— 7.50+10c for each \$100 or fraction over \$6000	
Over \$7000 to \$ 8000— 8.50+10c for each \$100 or fraction over \$7000	
Over \$8000 to \$ 9000— 9.50+10c for each \$100 or fraction over \$8000	
Over \$9000 to \$10000—10.50+10c for each \$100 or fraction over \$9000	

[and so on, adding 10c for each \$100 or fraction thereof, over any amount named. If it contain over two pages the clerk's fees are 50c + 3c for every 20 words, or 35c or 40c for every page over 2.]

N. B. (1) *Will*.—The cost of recording a will is the same as in No. 3, below, up to the value of \$1,000 (the State tax being 50 cents more and the clerk's fee 50 cents less); over \$1,000, the cost is 50 cents less (the State tax being the same and the clerk's fee 50 cents less).

(2) *Transfer fee*.—In case of a deed of conveyance or will add \$1.00 for transfer fee for commissioner of the revenue, but if property is again sold before Jan. 1, following, no other transfer fee is charged, the first grantee during the year preceding paying the fee (Code, § 2348).

(3) *Release or partition*.—The cost of recording a deed of release or partition is \$2.00 regardless of amount (the State tax being 50 cents in all cases).

(4) *Crop lien*.—The cost of docketing a crop lien for advances to farmers, is \$1.00 less than for deed (the clerk's fee being only 50 cents—Code, § 6452, as amended by Acts 1920, p. 339).

(4) Charter of corporation, State tax being paid State Corporation Commission (see *Corporations*, section 5), \$3.00, and for every page over two, 50 cents.

(5) General or limited partnership (Acts 1918, pp. 541, 364; Pollard's Code Biennial, pp. 513, 413 or *Partnerships and Partnerships Limited*), 50c + 3c for every 20 words.

(6) Lien (not in writing—if in writing it would be a deed of trust) on a colt for service of stallion or jackass (see Code, § 6446, or *Liens of Mechanics and Others*, section 24), 30c.

(7) Lien on calf for service of bull (see Code, § 6447, or *Liens of Mechanics and Others*, section 24), 25c.

(8) Forfeited *forthcoming bond* (see Code, § 6527, or *Forthcoming Bond*), 30c.

(9) *Lis pendens*, or attachment on real estate against non-resident debtor (Code, § 6469, § 3484, as amended by Acts 1920, p. 800), 50c + 3c for every 20 words.

(10) Judgment, decree, bond, or recognizance (Code, § 3484, as amended by Acts 1920, p. 800; § 6479, or *Judgments*), 50c.

(11) Execution of J. P. (Code, § 6031), 20c.

(12) List of heirs, with name, age, and address in Deed Book (Code, § 5379, § 3484 as amended by Acts 1920, p. 800), 3c for every 20 words.

(13) Certificate to practice medicine, in Medical Register (Code, § 1612), \$1.00.

(14) Certificate to practice optometry (Code, § 1633), 50c.

RECORDS (OFFENSES CONCERNING)

See *Forgery*

§ 1. False entries, or destruction of records by officers; how punished.—"If any clerk of any court, or other public officer, fraudulently make a false entry, or erase, alter, secrete, or destroy any record in his keeping and belonging to his office, he shall be confined in jail not exceeding one

year, and fined not exceeding \$1,000"; and shall forfeit his office, and be forever incapable of holding office. (Code, §§ 4516-17.)

§ 2. Theft or destruction of public records by others than officers; how punished.—See *Larceny*, section 5.

RECREATIONAL CENTERS AND HOME-CRAFTS

For an "act providing for the establishment of recreational centers and for the teaching of home-crafts, to be administered under the local board of public welfare," see Acts 1922, p. —.

REMAINDER

- § 1. Definition; distinguished from reversion
- § 2. Vested and contingent remainders, and their nature
- § 3. Where the remainder is to "children," "heirs," or other class of persons
- § 4. Acceleration of remainder
- § 5. "Alternative" remainders
- § 6. "Cross" remainders
- § 7. Transfer of remainders; sale by court
- § 8. Liability of remainders for debts
- § 9. Effect on remainder, of life tenant's power of disposal
- § 10. Statutory references to remainders and reversions

§ 1. Definition, distinguished from reversion.—A remainder is what is left (to another) of all the estate in lands transferred (by grant, deed or will), after a preceding part of the same estate has been disposed of, whose regular expiration the remainder must await; as, a conveyance to B. for life, and then to C. in fee simple, or a conveyance to B. for life, and then to C. in fee-simple, or a conveyance, the estate to C. in each case, being what is left, is a remainder. What is left in the grantor is called a reversion—see *Reversion*.

A freehold estate must precede a freehold remainder;

so, a deed to A. for ten years, then to B. in fee, conveys no remainder, but it is good as an executory limitation (Code, § 5147).

The estate after dower or curtesy (which is created by act of the law) is not properly a remainder or reversion. (1 M's Real Prop., §§ 732-7, 782, 804 (n. 4).)

There can be no proper remainder or reversion in personal property, though such property may be transferred with a limitation by way of remainder, reversion, condition or otherwise, as an executory limitation (Code, §§ 5188, 5147).

§ 2. Vested and contingent remainders, and their nature.

—There are two kinds of remainders, vested and contingent. A vested remainder is a remainder limited to a certain person and on a certain event, so as to possess a present capacity to take effect in possession, should the possession become vacant in any moment (91 Va. 378; 99 Va. 709; 100 Va. 653). It is not the uncertainty whether the remainder will ever be actually enjoyed in possession (for all freehold remainders are liable to that uncertainty), that makes it not vested, but contingent, but the present capacity to take effect in possession should the contingency happen; as, to A. for life, remainder to B. for life; the remainder is vested, though it may never actually take effect in possession, as if B. should die before A. (1 M's Real Prop., §§ 738-9.)

A contingent remainder is a remainder limited to an uncertain person, or upon an uncertain event, or to a certain person and on a certain event, but so as not to pass the present capacity to take effect in possession, should the possession become vacant at any moment (100 Va. 653-4; 101 Va. 543); as, to A for life, and at her death to be equally divided among her children, should any survive her; or to A and B for life, remainder to the survivor; or to A until she marries B, then to C; or to A for life, remainder after B's death to C in fee. If the contingency is a condition subsequent or following the vesting of the estate, it is a vested remainder; if a condition precedent (or preceding), the remainder is contingent. Where possible a court will construe a condition to be subsequent, the law favoring the vesting of estates; as, to A for life, remainder to B, if he live to 21, and if he fail to reach that age, then to

C; or to A for life, remainder to B, C, and D (the testator's children), and the share of one dying before A, to survivors; or to A for life, then "to testator's surviving children", or "to the surviving children of A" or of a third person, "surviving" referring to the testator.

Courts, also, as between "time" or "contingency", favor the former; as, to A for life, and "on", "at", "from", "in the event of", etc., A's death, then to B, the quoted references being to time, and the remainder is vested. So also as to "when" and "then". Wherever these adverbs refer to fixed dates or to events which must of necessity happen, they make no contingency but mark only the time of vesting in possession.

By section 5153 of the Code (already partially covered by section 5154): "A contingent remainder shall in no case fail for want of a particular estate to support it," as it would at common law; but it would now become, in such a case, an executory limitation (Code, § 5147). (1 M's Real Estate, §§ 738-47.)

§ 3. Where the remainder is to "children," "heirs," or other class of persons.—Where the remainder is to a class of persons, as, to a certain one's children, nephews, or brothers, or heirs, issue, or descendents of another, or any other designated class of persons, such persons, living at the testator's death or at the time of the conveyance, take a vested remainder, subject to open and let in others born afterwards,—even, it would seem (see Code, § 5153), those born after the end of the preceding estate. But until one of the class is born, the remainder is contingent. (1 M's Real Prop., §§ 749-51.)

By section 5152 of the Code, taken from the Code of 1887, completely abolishing the famous "Rule in Shelley's Case", and establishing the contrary, it is now provided: "Wherever any person, by deed, will, or other writing, takes an estate of freehold in land, or takes such an estate in personal property, as would be an estate of freehold, if it were an estate in land, and in the same deed, will, or writing, an estate is afterwards limited by way of remainder, either mediately or immediately, to his heirs, or the heirs of his body, or his issue, the words 'heirs,' 'heirs of his body,' and 'issue,' or other words of like import used in the deed, will, or writing in the limitation therein by way of remainder, shall not be construed as

words of limitation carrying to such person the inheritance as to the land, or the absolute estate as to the personal property, but they shall be construed as words of purchase, creating a remainder in the heirs, heirs of the body, or issue."

The statute was first introduced in the Code of 1849, but was not complete, it applying only where the remainder was vested in the heirs of the first taker, and not where the limitation was to the ancestor for the life of another, nor to any other freehold estate than for his own life. The Code of 1887 cured this defect. (1 M's Real Prop., § 778.)

§ 4. Acceleration of remainder.—Where vested in right, the possession being postponed to future day, the premature happening of the event "accelerates" the enjoyment of the possession; as, will to A for life, remainder to B for life, remainder to C in fee, B dying in the lifetime of A and C (106 Va. 710). (1 M's Real Prop., § 784.)

§ 5. "Alternative" remainders.—This is a limitation to another in case the first fails, called also "remainders upon a contingency in a double aspect" or "remainders upon a double contingency"; as, to A for life and if he have a son, to that son in fee, and if he have no son, then to B in fee. (1 M's Real Prop., § 784.)

§ 6. "Cross" remainders.—As to A, B, and C, for their lives (either severally or as tenants in common), with remainder upon their respective deaths to the survivors or survivor. These are "cross" remainders, and on the death of A, his land remains to B and C as tenants in common, and on the death of B his original share (not what he got from A) remains to C for life (97 Va. 318).

In deed cross remainders must be express, but in wills they are freely implied. (1 M's Real Prop., §§ 785-8.)

§ 7. Transfer of remainders; sale by court.—A vested or contingent remainder may be transferred by deed or will (Code, §§ 5147-8), or by descent (§ 5264). But otherwise where the remainder is contingent, because the remaindermen cannot be ascertained or are not in being. (1 M's Real Prop., §§ 802-3.)

A remainderman, his guardian or committee, whether the remainder be vested or contingent, may file a bill in a court of equity to have his remainder (but not the preceding estate)

sold, which the court will do if his interests will be promoted and the rights of others will not be violated thereby. (Code, § 5161.)

The statute also provides that the life tenant may have the entire fee-simple sold, where some of the remaindermen are incapable of giving their assent, if the remainder is contingent; but is the statute constitutional as to vested remainders owned by adults? (see 123 Va. 268.) The Revisors think it is—see note to § 5161. See *Real Estate*, section 4.

§ 8. Liability of remainder for debts.—Vested remainders are liable for the debts of the remaindermen and may be subjected therefor.

Contingent remainders, where the remaindermen are not ascertainable or not in being, cannot be subjected by creditors, unless possibly by attachment, the statute (§ 6389) expressly making “any remainder, vested or contingent”, liable to levy. As to contingent remainders in general, while the Virginia courts (89 Va. 675; 100 Va. 649) have used general language which might imply that no contingent remainder is liable to the debts of the remaindermen, yet the cases, says Prof. Raleigh C. Minor, “were cases of an unascertained remainderman”; in other cases, he says, “the weight of authority seems to be in favor of subjecting it.” (1 M’s Real Prop., § 805.)

§ 9. Effect on remainder, of life tenant’s power of disposal.—The former rule is now changed by statute (§ 5147), which provides that where, in a deed or will, with a limitation in remainder over, the instrument, expressly or impliedly, confers “a power upon the life tenant in his lifetime or by will to dispose absolutely of said property, the limitation in remainder over shall not fail or be defeated, except to the extent that the life tenant shall have lawfully exercised such power of disposal,” but a deed of trust or mortgage, unless there be a sale thereunder, shall not be construed to be such a disposition of the estate. (1 M’s Real Prop., § 806.)

§ 10. Statutory references to remainders and reversions.—See *Reversion*, section 2.

REMOVAL OF CAUSES

For removal of causes pending in one court to another, see Code, § 6175, and 4 Min. Inst., 808 & seq.

REPLEVIN

The common law action of replevin to regain the possession of personal property unlawfully taken, is abolished in Virginia (Code, § 5784), and is replaced in most cases by detinue or forthcoming bonds, and interpleader proceedings in others—see *Detinue*, *Forthcoming Bond*, and *Interpleader*. (See 4 Min. Inst., 430, 537, Burks' Pl. & Pr., title *Replevin*.)

RESCISSION OF CONTRACTS

See *Cancellation of Writings; Specific Performance; Sale or Exchange of Personal Property*

Contracts may be abrogated or annulled by mutual consent of the parties, which may be either expressed or inferred from acts or it may occur by the act of one party where the other has failed to perform his contract in its entirety but not where the failure has been partial only. The contract may, however, be rescinded for fraud even though partially executed.

Where goods are not as warranted, if the purchaser wishes to rescind the purchase, the safe course is to return the goods or make all reasonable effort to do so. To delay in this respect or do anything that might fairly be construed as an evidence that he accepts the goods after knowing of the deficiency would operate as an admission that there was no deficiency, or as a waiver of the right to rescind.

left to another; and covenants running with the land (see *Landlord and Tenant*, section 5, (8)) may run with the reversion, but not with a remainder; also right to re-enter for a breach of an express condition may exist as to a reversion but not as to a remainder, a reversioner merely retaining his old title, with its privileges, and burdens, as, the payment of the ancestor's debts (Code, §§ 5395, 5397), while the remainderman takes a new title as a purchaser, and his estate is not liable for the ancestor's debts, unless they have been made a specific lien or charge thereon. (1 M's Real Prop., §§ 807-11.)

As to a kind of reversion or remainder in personal property, see last paragraph under section 1, title *Remainder*.

§ 2. Statutory references to reversion and remainders.

—Sale of life estate for taxes does not affect the remainder or reversion (Code, § 2488).

When, upon failure of life tenant, to rebuild or repair a mill, manufactory, machine, or engine within proper time, the title reverts to the former owner, or the reversioner or remainder may rebuild or repair (Code, §§ 3591-2).

A reversion or remainder, at the termination of a life estate, is liable for the amount paid by the life tenant to a defendant in ejectment for improvements (Code, § 5498).

A grantee or assignee of the reversion of land let to lease, has the same rights by action or entry for forfeiture, or by action upon any covenant or promise in the lease, against the lessee, which the grantor, assignor, or lessor might have enjoyed; and conversely, a lessee may have against a grantee of the reversion, or any part thereof, the like benefit of any condition, covenant or promise in the lease as he could have had against the lessors themselves, except the benefit of any warranty, in deed or law (Code, §§ 512-13).

A grant or will of a reversion or remainder, is good and effectual without the tenant's consent to be the other's tenant; but no tenant shall suffer damage for paying rent to the grantor, without notice of the grant (Code, § 5514).

For payment or apportionment of rent paid by tenant entitled to emblements (see *Emblements*), or rent in case of lessee from tenant for life or other uncertain interest, see Code, §§ 5541, 5543. For apportionment in general, see *Apportionment*.

REWARDS

- § 1. Rewards for arrest of persons convicted of or charged with offenses
- § 2. Rewards offered by board of supervisors
- § 3. Rewards not over \$500 offered by superintendent of penitentiary for convict escaping
- § 4. Rewards for killing certain birds and animals

§ 1. **Rewards for arrest of persons convicted of or charged with offenses.**—By section 5068 of the Code: "The Governor may offer a reward for apprehending and securing any person convicted of an offense or charged therewith, who shall have escaped from prison, or for apprehending and securing any person charged with an offense, who, there is reason to fear, cannot be arrested in the common course of proceeding. But no such reward shall be paid to any sheriff, sergeant, or other officer who arrests such person by virtue of any process in his hands to be executed. The Governor may also offer a reward for the detection and conviction of the person guilty of an offense, when such offense has been committed but the person guilty thereof is unknown."

§ 2. **Rewards offered by board of supervisors.**—By section 2733 of the Code: "The board of supervisors of any county, in its discretion, when any felony has been committed or attempted to be committed therein, may offer a reward, not to exceed one hundred dollars, for the arrest and conviction of said criminal, to be paid out of the county levy." (Code, § 1906, p. 18.)

A similar provision has not yet been inserted as to cities and towns.

The supervisors may also offer \$50 reward for the capture of an illicit still—see *Intoxicating Liquors*, section 11.

§ 3. **Rewards not over \$500 offered by superintendent of penitentiary for convict escaping.**—See Code, §§ 5043-4.

§ 4. **Rewards for killing certain birds and animals.**—"The bounties hereinafter specified shall be paid for the killing of the predatory birds and animals hereinafter named, that is to say: Sharpshinned hawk, fifty cents; Cooper's hawk, fifty cents; crow, fifteen cents; great horned owl, fifty cents; minks one dollar; and weasels one dollar. No bounty for the killing of crows, however, shall be paid except on those

killed in the months, of April, May, June, July, August, or September. The said bounties shall be paid in the following manner: One-half by the department of game and inland fisheries, and the other half by the board of supervisors of the county in which the predatory bird or animal is killed, and if the board of supervisors of any county fails or refuses to pay one-half of the bounties aforesaid, the department of game and inland fisheries shall not pay the other half. All payments made by the department of game and inland fisheries for the bounties named in this act shall be made through the board of supervisors of the county in which the predatory bird or animal is killed. In order to entitle any one to the bounties allowed by this act, the applicant shall produce before the county clerk the head of the bird or animal herein above mentioned and make affidavit before the clerk that the same was killed within said county during time above specified; no fee shall be charged by the clerk for taking affidavit." (Acts 1920, p. 231.) See also Acts 1922.

RIOT, ROUT AND UNLAWFUL ASSEMBLY

See Affray

- § 1. Judge and justice may suppress riot, etc.; their duties as to same; who deemed a rioter
- § 2. Persons arrested therefor to be committed on failure to give bond
- § 3. Judge or justice failing in his duty, how punished
- § 4. If persons disobey order of judge or justice to disperse, he may require assistance
- § 5. Judges, justices, and persons acting under their orders, guiltless, if a person killed or wounded; if either of them killed, all engaged in the assembly guilty
- § 6. Punishment of rioter, when dwelling-house injured, and when not
- § 7. Riotous or disorderly conduct on train or street car a misdemeanor
- § 8. Form of "description" in warrant or indictment

§ 1. Judge and justice may suppress riot, etc., their duties as to same; who deemed a rioter.—"All judges and

justices may suppress riots, routs, and unlawful assemblies within their jurisdiction. And it shall be the duty of each of them to go among, or as near as may be with safety to, persons riotously, tumultously, or unlawfully assembled, and in the name of the law command them to disperse; and if they shall not thereupon immediately and peaceably disperse, such judge or justice giving the command, and any other present, shall command the assistance of all persons present, and of the sheriff or sergeant of the county or corporation, with his posse, if need be, in arresting and securing those so assembled. If any person present, on being required to give his assistance or depart, fail to obey, he shall be deemed a rioter." (Code, § 4527.)

These offenses are common law misdemeanors, and are closely allied in their ingredients, two of them being successive aggravations of the other. Commencing with the least offense, we will climb to the greatest.

(1) *Unlawful assembly*.—An unlawful assembly is an assembly of three or more, who, with intent to carry out some common purpose of a private nature, assemble in such a manner, or so conduct themselves when assembled, as to endanger the public peace by striking terror among the people, and yet neither execute their purpose, nor make any motion toward it.

(2) *Rout*.—A rout is where an "unlawful assembly" does some act or makes some motion toward executing its purpose, though it be only to go forth, but does not execute it.

(3) *Riot*.—A riot is where an "unlawful assembly" actually executes some object of a private nature, in a violent and turbulent manner, to the terror of the people.

To constitute either offense, there must be an assembly of three or more persons, with a common purpose in view, and that purpose must be to execute some private object, lawful or unlawful. In meeting, or when met, they must so conduct themselves, by show of offensive weapons, threatening speeches, turbulent gestures, or other circumstances of violence and tumult, as is calculated to strike terror to persons of ordinary firmness; and where the object is executed, the violence may be actual as well as constructive. The violence and tumult must be in some degree preconcerted,

though the parties need not have had it in mind when they met; but, being met together, if they suddenly, yet not concertedly, precipitate a disturbance and fight, it is only an affray.

Independently of this statute, the sheriff, constables, or other conservators of the peace, may and ought to do all that lies in them to suppress such assemblies, and may require all persons to aid them, who, if they refuse to assist, as well as the peace officers failing in their duty, are guilty of a misdemeanor. Indeed, private citizens may, of their own authority, endeavor to suppress such bodies, and for that purpose may bear arms and use them, if necessary, either in defense of their own lives and property or that of other persons; but such interference of private persons is hazardous, save in extreme cases or when a felony is about to be committed.

The command to disperse may be given in this form: "In the name of the law, I charge and command all persons here present, riotously, tumultuously, and unlawfully assembled, immediately and peaceably to disperse to their habitations or lawful business, upon all the pains and penalties of the law."

All actually engaged in such assembly are equally guilty as principals; whether they were originally concerned or not. Indeed, the mere inciting persons to assemble in a riotous manner, whether they so assemble or not, is a common law misdemeanor. But an infant, under fourteen, the age of discretion, cannot be guilty under this chapter. (H's G. & M., pp. 346-8.)

§ 2. Persons arrested therefor to be committed on failure to give bond.—"If a person be arrested for a riot, rout, or unlawful assembly, the judge or justice ordering the arrest, or any other justice, shall commit him to jail, unless he shall enter into recognizance, with sufficient surety, to appear before the court having jurisdiction of the offense, at its next term, to answer therefor, and in the meantime to be of good behavior and keep the peace." (Code, § 4528.)

For form of recognizance, follow No. 3, under div. V., section 7, title *Justice of the Peace*.

§ 3. Judge or justice failing in his duty, how punished.—"If any judge or justice have notice of a riotous, tumultuous, or unlawful assembly, and shall neglect to take any of the foregoing steps, he shall be liable to a fine of not more than \$100, and to imprisonment for not more than 30 days."

tuous, or unlawful assembly, in the county or corporation in which he resides, and fail to proceed immediately to the place of such assembly, or as near as he may safely, or fail to exercise his authority for suppressing it and arresting the offenders, he shall be fined not exceeding \$100." (Code, § 4529.)

§ 4. If persons disobey order of judge or justice to disperse, he may require assistance.—"If any persons, engaged in such assembly, being commanded as aforesaid to disperse, fail to do so without delay, any such judge or justice may require the aid of a sufficient number of persons, in arms or otherwise, and proceed, in such manner as he may deem expedient, to disperse and suppress such assembly, and arrest and secure those engaged in it." (Code, § 4530.)

And private citizens are bound to respond to such call of a judge or justice, under penalty of fine and imprisonment. See *Officers (Disobedience by and of)*.

§ 5. Judges, justices, and persons acting under their orders, guiltless, if a person killed or wounded; if either of them killed, all engaged in the assembly guilty.—"If, by any means taken under authority of this chapter to disperse any such assembly, or arrest and secure those engaged in it, any person present, as spectators or otherwise, be killed or wounded, any judge or justice exercising such authority, and every one acting under his order, shall be held guiltless; and if the judge or justice, or any person acting under the order of either of them, be killed or wounded in taking such means, or by the rioters, all persons engaged in such assembly shall be deemed guilty of such killing or wounding." (Code, § 4531.)

§ 6. Punishment of rioter, when dwelling-house injured, and when not.—"If any rioter or person unlawfully or tumultuously assembled, pull down or destroy, in whole or in part, any dwelling-house, or assist therein, or shall in the night-time stone the same in a manner calculated to terrorize the inmates, or assist therein, he shall be confined in the penitentiary not less than two nor more than five years; and though no such house be so injured or stoned, every rioter, and every person unlawfully or tumultuously assembled, shall be deemed guilty of a misdemeanor", which is

punishable by a fine not over \$500, or jail not over 12 months, or both. (Code, §§ 4532, 4782.)

A house of which the front room on the first floor is occupied by the tenant as a store, the back room as a dining-room, and the upper apartments (reached only by an outside stairway) as sleeping chambers, is a dwelling-house, and the riotous destruction of the front door and windows of the storeroom is a felony within the statute (16 Grat. 543).

§ 7. Riotous or disorderly conduct on train or street car a misdemeanor.—"If any person, whether a passenger or not, shall, while in any car or caboose, or on any part of a train carrying passengers or employees of any railroad or street passenger railway, behave in a riotous or disorderly manner, he shall be guilty of a misdemeanor (which is punishable by a fine not over \$500 or jail not over 12 months, or both—Code, § 4782). The agent or employees in charge of the train, car or caboose, may require such person to discontinue his riotous or disorderly conduct, and if he refuses to do so may eject him, with the aid, if necessary, of any other person who may be called upon for the purpose."

§ 8. Form of "description" in warrant or indictment.—

No. 1. RIOT, OR UNLAWFUL ASSEMBLY

(Code, §§ 4527-32.)

DESCRIPTION:

"together with one D. E. and divers other persons, did riotously, tumultuously, and unlawfully assemble together, and being so assembled together, did unlawfully assault and beat the said A. B. (or did execute some other object, whether it be lawful or unlawful), to the great disturbance and terror of the people of this Commonwealth."

A conviction may be had under the above for a riot, rout, unlawful assembly, or even an assault and battery.

If the offense be the *felony* named in the statute, instead of "did unlawfully assault and beat the said A. B.," say "did feloniously pull down and destroy (*in part*, if that be the case) the dwelling-house of the said A. B., there situated." In this case proceed as in other cases of *felonies*.

ROADS, BRIDGES, LANDINGS, AND WHARVES

See Bridges

- § 1. County
- § 2. County superintendent of roads and road supervisors
- § 3. State Highway System
- § 4. State Convict Road Force
- § 5. State Money aid
- § 6. Bond issue
- § 7. Federal aid accepted
- § 8. Offenses concerning highways
 - (1) Killing trees near, obstructing or riding on sidewalk
 - (2) Encroachment on or changing lines without permission of court
 - (3) Injuring sidewalks or shade trees in unincorporated town
 - (4) Railroad company obstructing free passage on street or road
 - (5) Moving steam engine along road without warning and spark arrester
 - (6) How bicycle to pass vehicle or horse on road or bridge
 - (7) Shooting in or along a road, or within 100 yards thereof or in a city, town, or village
 - (8) How travelers to pass on road or bridge
 - (9) Fast riding, driving or racing on road, streets, bridges, etc.
 - (10) Driving sheep along road over 10 miles without branding them
 - (11) Casting dead animal into road; leaving sick or crippled in road, street, or public place
 - (12) Restraint of unaltered horse, jack, or bull
 - (13) Putting glass, nails, tacks, etc., into road
 - (14) Driver of vehicle to stop at certain railroad crossings; gates to be erected
 - (15) Rules and regulations controlling traffic on State highways adopted by State Highway System (effective to date).

§ 1. **County.**—See generally, Code, §§ 1976-2004, and Acts 1918, p. 461, affecting § 2013, and Acts 1918, p. 452, affecting § 2016, and Acts 1922, amending § 2002.

For act as to special assessment for, see Acts 1918, p. 569; what signs prohibited—Acts 1918, p. 128; clearing underbrush from sides—Acts 1918, p. 556; when students not to pay tolls—Acts 1918, p. 29; railroads to clear grade crossings—Acts 1918, p. 452; protection to improved surface of turnpikes—Acts 1919, p. 97; authorizing supervisors to cut

trees along sides—Acts 1920, p. 535; county roads not part of State Highway System, how built—Acts 1922, p. —.

§ 2. County superintendent of roads and road supervisors.—See Code, §§ 2019-39, and Acts 1920, p. 562, amending § 2039. See also Acts 1919, p. 31 (as to repairs).

§ 3. State Highway System.—For a new act creating the State Highway System and other particular acts in reference thereto, and repealing §§ 1962-5, 1967-9, 1974-5 of the Code and former acts, see several acts listed in the index to Acts 1922.

§ 4. State Convict Road Force.—See Code, §§ 2073-96; and Acts 1920, p. 11, amending § 2094; Acts 1919 p. 120, amending § 2083; and Acts 1922, amending § 2073. See, also, Acts 1918, p. 8 (authorizing use of force in State Highway System).

§ 5. State money aid.—See Code, §§ 2097-2109, as affected by Acts 1918, p. 776, and Acts 1919, p. 100.

§ 6. Bond issue.—See Code, §§ 2110-24, and Acts 1922, amending §§ 2110-22. For act as to redemption of district and county roads, see Acts 1918, p. 462. For bond issue in magisterial district, see Acts 1922, p. —; county bonds for Acts 1918, p. 462.

§ 7. Federal aid accepted.—See Acts 1918, p. 8.

§ 8. Offenses concerning highways.—(1) *Killing trees near, obstructing, or riding on sidewalk.*—Punishment, fine not over \$500, or jail not over 12 months, or both. (Code, §§ 4730, 4782.) To ride or drive any vehicle, including bicycles and motorcycles, on the sidewalks of an unincorporated town or village, is punishable by a fine of \$5 to \$25. (Code, § 4733.)

(2) *Encroachment on or changing lines without permission of court.*—By section 4731 of the Code: "Any person other than a duly authorized officer, changing the line of any public road, on either side thereof, as the lines have existed for twenty years or more, shall be guilty of a misdemeanor, unless he shall have first obtained, upon petition, the permission of the circuit court of the county in which the road lies, which petition and permission shall be entered of record, showing how, and to what extent, the line of a public road has been changed. It shall be the duty of the super-

vehicle, conveyance or car, over or upon any public road, street or public square, at an illegal speed, or at a speed tending to endanger human life or bodily safety, or to cause the destruction of the property of another, or causes such vehicle, conveyance or car to run at an illegal or dangerous speed in attempting to pass another vehicle, conveyance or car, or to prevent such other vehicle, conveyance or car from passing his own, and any person who rides or drives any animal or animals over or upon any public road, street, highway, bridge, or landing, at a speed tending to endanger human life or bodily safety, or to cause the destruction of property, or if any horse race be run on any road, bridge, or landing or street, the rider of such horse in such race, the owner, if he assent thereto, and every person who shall bet on the race, shall be deemed guilty of a misdemeanor," which is punishable by a fine not over \$500 or jail not over 12 months, or both (Code, § 4782). Section 4740, as to fast riding or driving over a bridge, is repealed, the subject being covered by the above section.—Acts 1920, p. 486.

(10) *Driving sheep along road over 10 miles without branding them.*—Fine \$5. (Code, § 4742.)

(11) *Casting dead animal into road; leaving sick or crippled in road, street, or public place.*—Fine, not over \$20. (Code, § 4743.)

(12) *Restraint of unaltered horse, Jack, or bull.*—See *Animals*, section 8.

(13) *Putting glass, nails, tacks, etc., into road.*—Putting into a public road "glass, bottles, glassware, crockery, porcelain, or pieces thereof, or any pieces of iron or hard or sharp metal, or any nails, tacks, or sharp-pointed instruments of any kind, likely in their nature to cut or puncture any tire of any vehicle, or injure any animal traveling thereon", is punishable by a fine of not over \$500 or jail not over 12 months, or both (Code, §§ 4745, 4782). See also (15), (i), below.

(14) *Driver of vehicle to stop at certain railroad crossings; gates to be erected.*—By Acts 1922: "Except in cities and unincorporated towns and villages of 1,000 inhabitants or more it shall be the duty of every person driving any vehicle on a public highway, in approaching a place where

a railway crosses such public highway at grade, to stop before passing over such crossing, at a distance of not less than ten feet nor more than one hundred feet from the nearest rail of such railway tracks. Provided, that this act shall not apply to any public railway crossing at grade on railway lines on which only purely local trains are operated. The provisions of this act shall not change or alter in any manner the existing law as to the duty or liability of railway companies for damages to persons or property, and failure to comply with the provisions of this act on the part of the driver of the vehicle shall not be considered as contributory negligence in an action against the railway company for damage to person or property, whether the same be for injury to the person or property of the driver or of any other person. And it shall not be necessary to establish the fact, that the driver complied with the provisions of this act in order to recover in any action for damage to persons or property against the railway company. Except in cities and unincorporated towns, it shall be the duty of railway companies to erect and maintain at every point where a public highway crosses such railway at grade, and on which line trains other than purely local trains are operated, a sign, visible for one hundred feet on each side of its tracks with the words, 'Main Line—Danger—Stop,' in letters at least 6 inches in height. Any driver of any vehicle included in this act and any other person, firm or corporation violating the provisions of this act shall be fined not exceeding \$10 for each offense, provided this act shall not apply to electric railways."

(15) *Rules and regulations controlling traffic on State highways adopted by State Highway System effective July 25, 1920, and still in force July 1922.*—By the act creating the State Highway System (Acts 1922, p. —), the State Highway Commission is authorized "to make rules and regulations, not in conflict with the laws of this State, for the protection of and covering traffic on and use of the State Highway System, and the rules and regulations so prescribed shall have the force and effect of law, and any person, firm, or corporation violating any such rule or regulation shall be guilty of a misdemeanor, and upon conviction be fined not less than \$5

nor more than \$100 for each offense", and is also liable to the State civilly for the actual damages sustained. "Said rules and regulations shall be printed by the commission and two copies thereof mailed forthwith to the clerk of every court of record, one of which copies shall be posted immediately upon receipt by the clerk at the front door of the courthouse, and the other copy retained in the office for the information of the public, but no such rules and regulations shall become effective until 60 days shall have elapsed following their adoption by the commission." The commission, for the purpose of enforcement, may appoint any or all of its employees special policemen with the powers of a sheriff. The following rules and regulations have been promulgated by the commission (in force to date):

(a) *Vehicles or implements with sharp or rough wheels.*

—"It is forbidden to drive, propel or operate, or to cause to be driven, propelled or operated, over any State Highway, any implement, vehicle or contrivance having wheels provided with sharpened or roughened surfaces other than roughened pneumatic rubber tires; provided, however, that this restriction does not apply to vehicles or implements used by the State in the construction and maintenance of said State Highways, or to farm implements weighing less than one thousand (1000) pounds. Wheels of traction engines, etc., when provided with suitable filler blocks between cleats, will be considered as having smooth tires. Traction engines and tractors, when hauling threshing outfits, will be allowed on roads in the State System when equipped with cleats on the driving wheels of width of not less than $2\frac{1}{2}$ inches, when so placed and kept on the driver that not less than two cleats shall touch the ground at all times; also that such engines or tractors shall be so equipped to maintain on the front wheels a guide tire of not less than 2 inches on tractors of 18 H. P., or less; $2\frac{1}{2}$ inches on 25 H. P., or less, and 3 inches on 30 H. P. or less." (Rules and Reg., § 1.)

(b) *As to weight and width of wheels.*—"It is forbidden to drive, propel or operate, or to cause to be driven, propelled, or operated, over any State Highway, any vehicle, implement or contrivance, whose gross load on any one wheel shall exceed 500 pounds for each inch of width of

tire on same, when provided with solid tires, from the first day of May to the first day of December, and 400 pounds for each inch in width of tire, when provided with solid tires, from December 1st to May 1st, and 700 pounds for each inch of width of tire, when provided with pneumatic rubber tires, from January 1st to December 31st. Should it, however, be deemed advisable to increase the load per inch in width of tire over certain sections of The State Highway System, a permit to increase the loading shall first be obtained as hereinafter provided, but in no case shall the gross load on any one wheel exceed 700 pounds per inch in width of tire; provided further that the width of solid tires shall be considered as that portion coming in contact with an unyielding surface, and the width of pneumatic tires shall be considered as the total thickness measured from outside to outside of casing at the widest point between tread and rim when fully inflated with air, and provided further, that no vehicle, implement, or contrivance whose gross load shall exceed 12 tons shall be moved or operated over any State Highway unless a permit to do so shall first be obtained, as hereinafter provided." (Id., § 2.)

(c) *Dragging load forbidden*.—"It is forbidden to allow any vehicle, implement, or contrivance, or any part of the same, or any load, or portion of a load, carried on the same to drag upon the surface of any State Highway." (Id., § 3.)

(d) *Speed of vehicles, etc., with solid tires*.—"No vehicle, implement or contrivance, provided with solid tires, shall be operated over any State Highway at a rate of speed in excess of 15 miles per hour; provided, however, that when the gross weight of the same is 5 tons or greater, the rate of speed shall not exceed 12 miles per hour." (Id., § 4, (a).)

(e) *Heavy vehicles, etc., with rubber tires filled with air*.—"No vehicle, implement or contrivance, provided with pneumatic rubber tires, and whose gross weight shall be 3 tons, or greater, shall be operated over any State Highway at a rate of speed in excess of 20 miles per hour; provided, however, that when the gross weight of the same is 5 tons or greater, the rate of speed shall not exceed 15 miles per hour." (Id., § 4 (b).)

(f) *Trailers with solid tires.*—"No vehicle, implement, or contrivance, drawing a trailer, or trailers, provided with solid tires, shall be operated over any State Highway at a rate of speed in excess of 10 miles per hour; provided, however, that trailers provided with pneumatic rubber tires shall be subject to the same rules set forth in paragraph (b) of Rule 4." (Id., § 4 (c).)

(g) *Width, height, and length.*—"No vehicle, implement, or contrivance shall be operated over or allowed to stand upon any State Highway which has a total width of more than 7 feet, or a total height of more than 12 feet, or a total length (inclusive of trailers) of more than 50 feet, unless a permit be first secured as hereinafter provided; and provided further, that in no case shall any load be of greater dimensions than above set forth unless a permit for same be first secured." (Id., § 5.)

(h) *Placing tacks, wire, glass, etc., upon road.*—"It is forbidden to place or allow to be placed upon any State Highway any tacks, wire, scrap metal, glass, crockery, or other substance which may be injurious to the feet of persons or animals, or to the tires of vehicles, or in any way injurious to the surface of the highway." (Id., § 6 (a).) See, also, (18), above.

(i) *Signs on the right of way.*—"It is forbidden to place or allow to be placed within the right of way of any State Highway any advertising, or advertising signs, without first obtaining the permission of the State Highway Commission." (Id., § 6 (b).)

(j) *Material on the right of way.*—"It is forbidden to place or store or allow to be placed or stored, within the right of way of any State Highway any materials or articles, unless a permit be first secured as hereinafter provided." (Id., § 6 (c).)

(k) *Obstructing or disturbing.*—"It is forbidden to obstruct, dig up, or in any way disturb any State Highway until a special permit be first obtained, as hereinafter provided, and also a cash deposit made with the person from whom said permit is obtained to cover any actual or possible damage which may result from such contemplated obstruction or disturbance." (Id., § 7.)

(1) *Representatives to issue permits.*—"It shall be the duty of the State Highway Commissioner to appoint not less than 8 representatives to be located in the several sections of the State, and who shall have authority to issue special permits for the use of the State Highways other than as set forth above; provided such contemplated use will not, in the judgment of the State Highway Commissioner, be injurious to the State Highway or dangerous to other persons using same. It shall also be the duty of the State Highway Commissioner to, at least twice a year, post notices along all State Highways, at intervals, calling attention to these rules and regulations, and also giving the name and address of the representative who is authorized to issue such special permits as are hereinbefore provided." (Id., § 8.)

(m) *Rules of the road.*—"The following is to be considered as supplementary to, but in no way conflicting with, the provisions of Chap. 522, Acts of 1916, and must be rigidly observed by drivers of all vehicles and implements driving upon or approaching a State Highway."

(1) *Brake and signalling device.*—"Vehicles and implements, propelled by other than animal power, must be provided with brakes and some suitable type of signalling device in addition to the lights on front and rear, as required by Chap. 522, Acts of 1916, but no device other than an approved brake will be allowed to be used on any vehicle on a State Highway." (Id., § (a).)

(2) *Rules as to passing each other.*—"All vehicles or implements, horse drawn or otherwise, when being driven on State Highways, upon meeting others shall turn to the right of the center of the highway so as to pass without interference, and in rounding corners or curves shall keep as far to the right of the road as is reasonably possible; and any vehicle overtaking another going in the same direction shall pass to the left of the vehicle so overtaken, provided the way ahead is clear of approaching traffic, but no vehicle shall pass another from the rear at the top or near the top of a hill, or on a curve where the view ahead is in anywise obstructed or while the vehicle ahead is crossing an intersecting highway; any vehicle so overtaken shall promptly, upon signal, turn as far to the right as reasonably possible

without increasing speed, in order to allow free passage on the left. At the intersection of highways, all vehicles shall keep to the right of the center of such highways, and close to the right hand side of the road when turning to the right, and pass to the right of the center of such intersection when turning to the left. Slow moving vehicles or implements shall at all times keep as close to the right hand side of the Highway as practicable." (Id., § (b).)

(3) *Turning into intersecting road.*—"All vehicles about to turn from the road upon which they are traveling into any intersecting road shall gradually reduce their speed to a point not exceeding 10 miles per hour for a distance of not less than 25 feet, before beginning to make such turn, and where the view of the intersecting road is obstructed, maintain such reduced speed until the turn has been completed." (Id., § (c).)

(4) *Approaching from intersecting roads.*—"All vehicles and implements shall have the right of way over others approaching on intersecting roads from the left, and shall give right of way to those approaching from the right." (Id., § (d).)

(5) *Vehicles, etc., to stand on the right.*—"All vehicles and implements not in motion shall stand with their right side as near the right hand side of the highway as practicable, except in incorporated towns which have special parking ordinances." (Id., § (e).)

(6) *Carrying poles or other projecting objects.*—"All vehicles or implements carrying poles or other objects, which project more than 5 feet from the rear end of same, shall during the period of from one hour after sunset to one hour before sunrise carry a red light at or near the end of the projecting object, and during the period of from one hour before sunrise to one hour after sunset display a red flag at or near the end of the projecting object." (Id., § (f).)

ROBBERY

See *Extortion*

- § 1. The statute
- § 2. Definition of robbery, and its constituents
 - (a) What constitutes a taking, and illustrations
 - (b) Goods must have some intrinsic value
 - (c) From the person of owner, or in his presence
 - (d) Taking against the owner's will
 - (e) Taking by violence, and illustrations of
 - (f) Taking by putting in fear, and illustrations of
- § 3. Conviction of larceny or assault under indictment for robbery
- § 4. Form of "description" in warrant or indictment

§ 1. **The statute.**—"If any person commit robbery, by partial strangulation or suffocation or by striking or beating, or by other violence to the person, or by the threat or presenting of fire arms, or other deadly weapon or instrumentality whatever, he shall be punished with death, or in the discretion of the jury, by confinement in the penitentiary not less than eight nor more than eighteen years. If any person commit a robbery in any other mode, or by any other means, he shall be confined in the penitentiary not less than five nor more than ten years." (Code, § 4405.)

The statute defines the offense, but only regulates the punishment according to the degree of heinousness of the offense. So robbery is still a common law offense, and there is no such a thing as "statutory robbery." It is sufficient if the indictment or warrant is in the common law form. (87 Va. 257.)

§ 2. **Definition of robbery, and its constituents.**—Robbery is the feloniously and forcibly taking of money or goods of any value from the person of another, or in his presence, against the owner's will, by violence or putting him in fear. (87 Va. 257.)

From the above definition of robbery we observe its several constituents, which will be treated under the following heads: (1) What constitutes a taking; (2) goods must have some intrinsic value; (3) from the person of owner, or in his presence; (4) taking against the owner's will; (5) taking by violence; and (6) taking by putting in fear.

(a) *What constitutes a taking, and illustrations.*—It is

enough to constitute a taking if the possession be gained even for a moment and then lost again; and no subsequent restoration of the goods will purge the offense. As, where a gentleman's purse was taken and restored and the contents then demanded, and the thief was apprehended before contents were delivered, it is robbery; so also, where a lady's diamond ear-ring was torn from her ear, and lost by the thief in the curls of her hair. There may, also, be a taking in law as well as in fact, as where there is no actual violence to the person, but the goods are delivered up under the influence of fear. Thus, where thieves force a man, by menaces of death to fetch them money, which he delivers to them while the fear of the menace still continues upon him, and they receive it, this is a sufficient taking in law; for the thief may, in all such cases, as correctly be said to take the property from the owner as if he had actually taken it out of his pocket. The taking must be with a felonious intent, which is determined by the jury, and inferred usually from the act itself. But the circumstances may repel the inference, as where the title is *bona fide* claimed by the defendant. The taking need not, in Virginia, be *lucri causa*—i. e., with intention to appropriate the property to his own use. If he intended to deprive the prosecutor of his property, that is sufficient.

(b) *Goods must have some intrinsic value.*—Robbery may be of all kinds of chattels, animate and inanimate, wherein there may be property in possession, and which have an intrinsic value; or, of the same goods, in other words, as in simple larceny (see *Larceny*). Although bonds and other securities for money, &c., are by statute made subjects of larceny (simple and compound), yet if one by menace of violence be constrained to execute a bond or other security, it is not robbery, because the bond is voidable for the duress; and the act is not within the purview of the statute.

(c) *From the person of owner, or in his presence.*—The taking may, but need not, be from the person of the owner—it is enough if it be in his presence, provided only that in taking from his immediate care and protection, there be violence to his person, or putting him in fear—e. g., where the party attacked throws his purse away and the robber

picks it up in his presence; also where the robber, having assaulted the party, takes away his horse while the owner is standing by, or drives away his cattle in his presence. The taking must be with the party's consciousness, or else by violence; but if without violence while he is asleep, it is not robbery. The goods must be in the custody of the party.

(d) *Taking against the owner's will.*—Where force is used, "against the will" is convertible with "without consent," as in the parallel case of rape; so that, where the defendant knocked the prosecutor down, and, when the latter was insensible, robbed him, the robbery was held to be complete. But if the taking is by collusion with some of the persons engaged, in order to obtain a reward for apprehending robbers, it is not robbery.

(e) *Taking by violence, and illustrations of.*—It is not every degree of actual violence that will constitute this offense. There must be something more than a sudden taking or snatching from the person unawares, for snatching a thing unawares from the hand or head is mere larceny, and not robbery. But if any injury be done to the person, or if there be a previous struggle, however slight, to retain his property, then the violence is sufficient to make the offense robbery—e. g., tearing a lady's ear in snatching her ear-ring, or her hair in taking a diamond pin twisted in the hair by a long screw-stalk is robbery. So, if a thief snatches at a gentleman's sword or watch, and the owner makes a vain effort to retain his property, or force is required to detach it from his person—e. g., by breaking a guard-chain—it is robbery. So it is robbery if force is used under pretense of law, or other colorable pretext, or for a different purpose (e. g., rape), if thereby money or goods are extorted.

(f) *Taking by putting in fear, and illustrations of.*—The principle of robbery, indeed is violence, but actual violence is not the only means of doing a robbery. It may be effected by fear as well, which the law considers constructive violence; for, says the law, when such terror is impressed on the mind as not to leave the party a free agent, and, in order to get rid of that terror, he delivers his money to the thief, this is sufficient force in law. And where actual force is used there need be no actual fear—e. g., to knock a man

down and take his property while he is insensible or unconscious. Nor need actual fear be proved, for the law, in *odio spoliatoris* (in hatred of a despoiler), will presume it, where in consequence of threatening words or gestures, or other circumstances, there is sufficient ground for such fear as in reason and common experience will induce a man to part with his property against his will. So there need be no actual danger if there be such a fear—e. g., where the thief uses a tinder-box or candle-stick as if it were a pistol. It is not, however, the apprehension of every injury that constitutes robbery. The fear must be of an injury, either (1) to one's self, wife, or child; (2) to one's character, by threatening to accuse him of sodomy, and the goods must have been parted with from a fear of loss of character, and not in order to prosecute the offender; or (3) to property, but the danger must be urgent, of speedy and signal mischief, such as cannot be evaded by ordinary firmness or prudence, nor prevented by law. Actual cases of this latter are principally threats made by mobs to destroy a dwelling-house.

By statute, in Virginia, to threaten injury to the person, character, or property of another, &c., and thereby extort money or pecuniary benefit, is a substantive offense, but only in cases, it is presumed, not amounting to robbery—see *Extortion*.. (H's G. & M., pp. 130-3.)

§ 3. Conviction of larceny or assault under indictment for robbery.—The justice or jury may acquit the accused of the circumstances of aggravation which constitute robbery, and convict him of simple larceny, grand or petit, or even of a mere assault. (H's G. & M. p. 138; 17 Grat. 591.)

§ 4. Form of "description" in warrant or indictment.—

No. 1. ROBBERY BY VIOLENCE TO THE PERSON

(Code, § 4405.)

DESCRIPTION:

"feloniously did (*strangle, stifle, smother, choak, suffocate*), strike, beat, and assault one E. F., and him the said E. F. in bodily fear feloniously did put, and one gold watch of the value of fifty dollars, and one bank note of the value of five dollars (or whatever the goods taken may be), of the goods and chattels, bank note and property of the said E. F., from the person (or *in the presence, custody and control*), and against the will of the said E. F., then and there, to-wit,

on the day and year aforesaid, feloniously and violently did steal, take, and carry away."

No. 2. ROBBERY BY THE THREAT OR PRESENTING OF FIRE-ARMS, OR OTHER DEADLY WEAPON

(*Idem.*)

DESCRIPTION:

"by the threat and presenting of a deadly weapon and instrumentality, to-wit: a pistol, one E. F. in bodily fear feloniously did put, and money of the value of one hundred dollars, of the goods and chattels, money, and property of the said E. F., from the person (or in the presence, custody, and control), and against the will of the said E. F., feloniously and violently did steal, take, and carry away."

RULES AND RULE-DAYS

(See "Burks' Pleading & Practice" (new ed.).)

"Rules" are orders of court, whether made in court or in the clerk's office, and "rule-days" are days set apart periodically (usually 1st and 3rd Mondays, Tuesdays and Wednesdays) for making rules or orders in the clerk's office, in pending causes, in the maturing causes, ready for court. While a defendant is summoned to a rule day, he need not appear; he should have an attorney, who will attend to all necessary filing of pleas, etc., in the clerk's office. For the statutes as to rules and rule-days, see Code, §§ 6074-80.

SALE OR EXCHANGE OF PERSONAL PROPERTY

See *Bill of sale; Conditional Sale, or Reservation Title or Lien; Contracts; Recordation or Registry*

- § 1. What constitutes a sale
- § 2. Difference between sale and exchange
- § 3. When title transferred to buyer, and goods at his risk
- § 4. What is a delivery at another place

- § 5. Lien against goods at time of sale
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- § 8. Sales where seller has not property at time
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- § 10. Seller's liability for quality of goods
 - (1) Where he warrants the quality
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 - (3) In case of misrepresentation or concealment

§ 1. **What constitutes a sale.**—It is important to distinguish carefully between a sale and an agreement for a future sale. This distinction is sometimes overlooked; and hence the phrase “an executory contract of sale,” that is, a contract of sale which is to be executed hereafter, has come into use; but it is not quite accurate to speak of this as if it were a sale. Every actual sale is an executed contract, although payment or delivery may remain to be made. There may be an executory contract for sale, or a bargain that a future sale shall be made; but such a bargain is not a present sale; nor does it confer upon either party the rights or the obligations which grow out of the contract of sale.

A sale of goods is the exchange thereof for money. More precisely, it is the transfer of the property in goods from a seller to a buyer, for a price paid, or to be paid, in money. “Property” in goods means the ownership or title of the goods and not the goods themselves.

If a bargain transfers the property in (which means the ownership of) the thing to another person for a price, it is a sale; and if it does not transfer the property, it is not a sale; and, on the other hand, if it be not a sale, it does not transfer the property. As soon as a thing is sold the buyer owns it, wherever it may be. And to constitute a sale at common law, all that is necessary is the agreement of competent parties that the property in (or ownership of) the subject-matter shall then pass from the seller to the buyer for a fixed price. (Parsons' Law of Business, pp. 116-17.)

§ 2. **Difference between sale and exchange.**—A sale is a transfer of personal property for money or currency; an exchange is a barter or exchanging of some personal property for other personal property; and there is but little difference as to each, except in the case of an exchange, if one

party fails to deliver the goods in a reasonable time, the action is not for their money value (unless indeed their price is precisely estimated or fixed), but for the breach of the contract to deliver. (3 Min. Inst., 250.)

§ 3. When title transferred to buyer, and goods at his risk.—Unless otherwise agreed, every contract of sale is presumed to be for cash, and to be followed by immediate delivery, and if either the price or the property be at once tendered, the sale is binding and the buyer is entitled to the possession. But if neither the money be paid or tendered nor the property delivered or tendered, nor any subsequent contract for future payment or delivery be entered into, the contract of sale is, by mutual consent, waived and abandoned, and the owner may dispose of the property as he pleases. Yet, if any part of the price be paid down, though it be but a cent, or if any part of the goods be delivered by way of earnest, the property in the goods passes, and the buyer may recover them by action, as the seller may the price.

As soon as the contract of sale of specific property is complete, the risk is transferred to the buyer; and it is complete when the terms are mutually agreed upon and the seller has fulfilled whatever condition precedent or concurrent, is expressly or impliedly prescribed by the terms, as by putting the property into a deliverable state, or conveying it to the place of delivery, or otherwise, and has also done what was contemplated and designed to be done previous to the vesting of the property, for the purpose of ascertaining the price, as, weighing, measuring, selecting, or testing the commodity; the property in the goods passes to the buyer, and they are thenceforward at his risk. Of course, if at the time of the contract, the thing sold has died or ceased to exist, the contract is not valid; but its death or destruction immediately afterwards, without the seller's fault, does not effect the contract. (3 Min. Inst. 252-4.)

§ 4. What is a delivery at another place.—As to sales of goods to be delivered at another place, the following rules apply: (1) Where the goods are delivered by the seller, in pursuance of an order, to a railroad or express company or other common carrier for delivery to the buyer, such delivery passes the title or property, such carrier being the

agent of the buyer to receive it; (2) where goods, not by order of the buyer, are delivered on board a vessel to be carried, and a bill of lading is taken in his name, the delivery is not to the buyer; (3) the making the bill of lading so that the goods shall be delivered to the order of the seller is, when not rebutted, almost conclusive to show his intention to reserve the right of control, and to prevent the property from passing to the buyer; (4) the *prima facie* conclusion that the seller reserves the right of control, when the bill of lading is to his order, may be rebutted by proof that in making it thus, he acted as the agent of the buyer, and did not intend to retain control of the property, which intention the jury decides; (5) though as a general rule the delivery of goods by the seller on board the buyer's own ship is a delivery to him and passes the property, yet the seller may by special terms restrain the effect of such delivery, and reserve the right of control even where the bill of lading show that the goods are free of freight because the owner's property; (6) where a bill of exchange for the price of goods is sent to the buyer for acceptance, together with the bill of lading, the buyer cannot retain the bill of lading unless he accepts the bill of exchange, and if he refuses acceptance, he acquires no right to the bill of lading or to the goods of which it is the symbol. (3 Min. Inst. 254-5.)

§ 5. Lien against goods at time of sale.—Where at the time of the contract of sale, an execution against the seller is in the officer's hands to be executed, they are subject to the lien of the execution; the title is thereby intercepted if the execution be levied during the existence of the lien (Code, §§ 6485, 6501-2; likewise the lien of an attachment (Code, § 6398), or other lien may intercept the title and prevent its vesting in the buyer. (3 Min. Inst. 251-2.)

§ 6. Seller's lien for purchase money.—Where the sale is otherwise complete, but nothing specified as to the delivery or payment, the seller has a right, flowing out of the original contract, to retain possession until the price is paid; and sometimes, upon non-payment of the price, to dissolve the contract, as he may do if the buyer, upon request, does not pay and take them away within a reasonable time, in which event he may sell to another, and sue the buyer for any loss suffered.

This seller's or vendor's lien continues as long as the goods remains in his possession and until there has been an actual or constructive delivery of them to the buyer, but terminates immediately upon such delivery. And a delivery of a part (where not intended as a delivery of the whole) is no waiver of the seller's right to retain the remainder for the price. It is sometimes difficult to determine whether the seller has parted with the possession. Thus, although where the goods are in a warehouse of a third person, a delivery order for the goods on that person, accepted or acknowledged by him, amounts to a constructive delivery, and terminates the seller's lien; yet where the goods are in the seller's warehouse, a delivery order merely will not have that effect, unless it appear that the seller, by receiving warehouse rent or otherwise, distinctly acknowledged the goods to be held by him for the buyer or the buyer's assignee. But where the goods are sold on credit not yet expired, the seller, upon the buyer's becoming bankrupt or insolvent, may withhold the goods, even as against the buyer's assignee in bankruptcy, until payment of the price; and if, in such a case, he has taken a negotiable note and has negotiated or transferred it to some one else, his lien is suspended while the note is running; but upon its being dishonored, the lien revives as to such of the goods as are still in his possession.

If the sale is at auction and its terms are not complied with, the seller, though no stipulation to that effect, may cause a resale, and charge the first purchaser with the loss or deficiency, if any, and the cost of the resale.

If, independently of the seller's lien, there is a condition precedent attached to the contract of sale and delivery, the property does not vest in the buyer on delivery, nor until he performs the condition or the seller waives it; and the right continues in the vendor, even against the buyer's creditors or *bona fide* purchasers from him for value. So, though immediate possession is given, if there is an express agreement that the title shall remain in the seller until payment of the price, such payment is strictly a condition precedent, and until performance, the right of property is not vested in the purchaser; nor can his creditors or *bona fide* purchasers for value and without notice, set up any valid claim thereto

But the contract, being a conditional sale, should be in writing and recorded (Code, § 5189, as amended by Acts 1920, p. 398). See *Conditional Sale or Reservation Title or Lien*. (3 Min. Inst. 256-8.)

§ 7. Seller's right of stoppage in transit.—Notwithstanding a delivery to a common carrier, to be conveyed to the buyer is usually equivalent to a delivery to the buyer himself and terminates the seller's lien; yet if while the goods are in transit the purchaser becomes bankrupt or insolvent, the price being unpaid, the seller's lien is prolonged and he may stop the goods en route and repossess them, which is called the right of stoppage in transit. The right is not a right to rescind the contract of sale, but a prolongation of the lien. The bankruptcy or insolvency must have occurred, or perhaps have become known to the seller, after the sale; and if it exists upon arrival of the goods at their destination, though it did not exist when the goods were stopped, the stoppage is justified. The right exists only as between the seller and buyer, or persons in substantially that relation, as where a consignor on his own credit buys for the consignee, but not in case of a surety for the price, nor where the goods are forwarded to pay a precedent and existing debt.

"Insolvency" is not a mere general inability to pay one's debts, but "an inability to pay one's debts in the ordinary course of business, as persons generally do", which is the construction in bankrupt laws.

To stoppage, actual possession is not required, but notice of the seller's claim and purpose, given to the carrier before delivery, is sufficient.

When the seller takes possession, the goods are still the buyer's, but he has a lien, and must keep them safely; and allowing the buyer a reasonable time to pay, he may, upon default, sell them for the best price he can get, and therefore most properly at public auction, paying any balance to the buyer, and the buyer being responsible for any deficiency.

Stoppage in transit extends also to contracts of exchange, and prevails when the consignor or seller is interested, in the sale, although it be jointly with the consignee or buyer. But it does not arise between a commission merchant and his principal, for the property remains the principal's, who may resume

possession when he will; while any lien the commission merchant may have for advances, etc., ceases when he parts with the possession, and is not re-instated by a re-delivery to him under a right of stoppage. As to when the transit is at an end, the goods are considered in transit not only while they are going and while in the actual possession of the carrier (although appointed by the consignee or buyer), but also while they are deposited in any place not actually or constructively the place of the consignee or buyer, or so in his possession, or under his control, that the putting them there implies the intention of delivery; as, when they are in a public warehouse, for non-payment of duties, this is not possession by the buyer. Constructive delivery may be where the carrier, by arrangement with the buyer, holds the goods as the buyer's agent, and not merely as carrier; or where the seller suffers the buyer to mark and resell the goods, and the second buyer to re-mark them again; or when the seller delivers to the buyer the key to the warehouse where the goods are stored. (3 Min. Inst., 259-62.)

§ 8. Sales where seller has not property at time.—An actual sale, as distinguished from a contract to sell, must be of property having an actual or potential existence, and specified or identified and capable of delivery; as, a crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk that his cows will yield in the coming month or the colts of his mares the coming spring, etc.; but he can only agree to sell, not actually sell, when the property is afterwards to be acquired from another, as, crop, wool, milk, or colts, or any goods to which he may obtain title. In equity, a contract to sell operates as a sale and vests the title in the buyer as soon as acquired by the seller.

It is not needful that the seller should have possession; he may sell it, though it be withheld by a wrong-doer.

The seller can transfer to the buyer no other or better than he has, except in the case of negotiable instruments (Code, §§ 5616-21)—see *Negotiable Instruments*. (3 Min. Inst., 263-4, 268.)

§ 9. Warranty of title.—A seller in possession impliedly warrants the title, and is answerable to the buyer for the loss of the goods by a better title; but where the seller

is out of possession, he is liable only where he warrants the title, or knowingly makes a false statement about it. This, of course, does not apply to sales by court, an officer (under an execution), or a pawnbroker. (3 Min. Inst. 265.)

§ 10. Sellers' liability for quality of goods.—He is liable: (1) *Where he warrants the quality.*—This may relate to the present or the future, and may be a warranty in terms or by distinct affirmation of quality—not merely an expression of opinion, but an assurance to the purchaser of the truth of the fact affirmed, the purchaser receiving and acting upon it as such. In either case it is immaterial whether the seller knew what he said to be false or not. But the warranty must be made during the negotiation and before the sale is concluded.

All warrants may be explained or proved by the surrounding circumstances, established usage in similar cases, and the general character of the transaction, but not extending nor contracting the words employed beyond their fair and natural meaning. A general warranty of soundness does not cover defects plain and obvious to the purchaser, or of which he knew; as, where a horse lacks a tail or an ear.

(2) *Where the property is not existent or present.*—Where such property is sold by sample or description, the same must correspond with the sample or answer to the description, and be salable or merchantable, otherwise it is a breach of or non-compliance with the contract, and not properly a breach of warranty. Where articles for a specific use or purpose are sold before made, they must be reasonably fit for that purpose. But where a known and ascertained article is ordered by name or description, it need only be of the character described, whether it accomplishes the end or not.

In such cases, the buyer may rescind the entire contract, by giving notice to that effect within a reasonable time and returning the property.

(3) *In case of misrepresentation or concealment.*—Even if the seller knows of a defect which the buyer does not know of, and if he had known; he would not have bought, the seller is not in law (though he is in good morals) bound to disclose it, if the facts were equally within the ob-

servation of both parties and if the seller is under no special obligation by confidence reposed or otherwise to disclose the facts. Mere silence by itself does not amount to fraud. The seller may leave the purchaser to inquire and examine for himself, or to require a warranty. He may be silent and be safe. He may let the purchaser cheat himself at his pleasure, but he must not assist him, either by false representation, which he knows, or has reason to believe, to be false; or by representations calculated to throw the buyer off his guard; or by practicing artifices to conceal defects. To do so is fraud. (3 Min. Inst. 266-9.)

SEDUCTION

See Adultery, Fornication, etc.

- § 1. Seduction of female of previous chaste character; how punished
 - (1) Seduction
 - (2) Promise of marriage
 - (3) The female must be unmarried
 - (4) Previous chaste character
 - (5) Evidence necessary to convict; limitation; marriage a bar to prosecution
- § 2. Seduction as a civil injury
- § 3. Form of "description" in warrant or indictment

§ 1. Seduction of female of previous chaste character; how punished.—By section 4410 of the Code: "If any person, under promise of marriage, conditional or unconditional, seduce and have illicit connection with any unmarried female of previous chaste character, or if any married man seduce and have illicit connection with any unmarried female of previous chaste character, he shall be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary not less than two, nor more than ten years. For the purposes of this section, the chastity of the female shall be presumed, in the absence of evidence to the contrary."

Seduction was not a crime at common law, but is purely

a creature of statute. The statute creates two offenses: (1) Seduction by an unmarried man, under a promise of marriage; and (2) seduction by a married man, which need not be under a promise of marriage. To constitute the first offense, it is necessary to show (1) the seduction; (2) the promise of marriage; (3) that the female was unmarried; and (4) that she was of previous chaste character.

(1) *Seduction*.—Mere illicit intercourse during the existence of a marriage engagement is not sufficient—there must be seduction besides. That is, the female must be induced to consent to sexual intercourse by enticements and influences which overcome her scruples against it. But if she voluntarily, and solely for the gratification of her sexual desires, or other reasons, submits to the connection, this is not seduction. A female of chaste character does not entertain feelings of lust. She repels the very thought of impurity. There is no way to poison her mind and dethrone her virtue except through her affections. To do this the seducer pays her delicate attentions, praises and flatters her, and pours into her ears pretensions of love; he gains her confidence, then her heart; then follows lustful toyings and sensual embraces; he draws her away from pure and chaste thoughts; she forsakes the path of purity and duty, and becomes the victim of lust and passion, and relying upon and trusting him, she consents to his lecherous embraces and submits her body to his lust—this is seduction. What constitutes seduction cannot be defined with precision. Each case must be determined by its own circumstances. The crime may be complete, although in the particular case, “flattery, false promises, artifice, urgent importunity, based upon professions of attachments, and the like for the woman,” did not conspire to cause the surrender of her person and chastity to her seducer. But there must be something more than sexual intercourse proved. A female of chaste character must have been led away from the paths of virtue. Seduction does not consist in arts and blandishments, but these are the means by which the crime is accomplished (and not the crime itself), which are as various as the characters and environments of the parties, and are incapable of being brought within the terms of a definition. But if the offense be by a married man, this of itself excludes many of the arts, wiles.

professions, and promises which may be brought to bear by a single man to obtain a footing and influence with a single woman. (Mill's case, 83 Va. 815; Flick's case, 97 Va. 766, 770; 2 Va. Law Reg. 698; 5 Va. Law Reg. 213.)

(2) *Promise of marriage.*—The seduction must be under and by means of a promise to marry, and the female must have surrendered her chastity by reason of such promise existing at the time of the intercourse. A mere blunt offer of wedlock *in futuro* for sexual favors *in presenti*, is not sufficient evidence—this smacks too much of hire, or bargain and barter, and not enough of betrayal. But if under an existing promise of marriage, he, by blandishments of courtship, wins and then abuses her simplicity and confidence, and deflours her of her virtue, it is seduction. If this be done without any promise of marriage, it is only the lesser offense of fornication. If a married man, seduce a female, under promise of marriage, she not knowing the fact of his marriage, he would be punishable under the first of the statute, which says: "If any person,"—i. e., whether married or single. If she knows him to be married, but he, standing towards her in the relation of trust and confidence, as, for example, guardian, next kinsman, teacher, or spiritual adviser, violates his trust and deflours her of her virtue, he is guilty of seduction. (Mill's case, 93 Va. 815; 2 Va. Law Reg. 670; 5 Va. Law Reg. 206-7.)

(3) *The female must be unmarried.* If she be married, the offense is adultery or fornication. That she is unmarried must be alleged and proved. (2 Va. Law Reg. 678; 5 Va. Law Reg. 207.) If she is under fifteen years of age, the offense is rape—(see *Rape*). If she has been married and divorced, she is not an "unmarried female", within the statute (109 Va. 821).

(4) *Previous chaste character.*—The law presumes that a female is of previous chaste character, and the burden of impeaching it is on the accused. The chastity protected by the statute is actual personal defilement. And even though she may have been defiled and impure at one time, yet if she has reformed and is leading a pure and virtuous life at the time of the alleged seduction, she is entitled to the protection of the statute. (Mill's case, 93 Va. 815; 5 Va. Law Reg. 208; 2 Whart. Cr. L. § 1757.)

(5) *Evidence necessary to convict; limitation; marriage*

a bar to prosecution.—No conviction shall be had on the testimony of the female seduced, unsupported by other evidence, nor unless the indictment be found within two years; but the subsequent marriage of the parties may be pleaded in bar of a conviction. (Code, § 4413.)

And evidence of the general reputation of the female for chastity, may be introduced either by the Commonwealth or the accused. (Acts 1920, p. 586; Pollard's Code Biennial 1920, p. 787.)

§ 2. Seduction as a civil injury.—Changing the common law by section 5780 of the Code: "An action for seduction may be maintained, without any allegation or proof of the loss of the service of the female by reason of the defendant's wrongful act". But this statute does not dispense with allegation and proof that the plaintiff was the master of his daughter (i. e., had control of her and her services) and so entitled to her services at the time of the seduction. So if when seduced a daughter is over 21, and living away from home, her father is not her master, and cannot sue for her seduction. It is a question whether the father, being her master, can sue in the absence of any disability to serve, as by pregnancy, sexual disease, or loss of health by reason of depression due to her dishonor. He can sue in the old form as for loss of service when there has been pregnancy. She cannot sue for her own seduction. But her consent is not the father's consent, and he can sue as master, though the defendant used no seductive arts, and the female was not of previous chaste character. These matters could be shown, however, in mitigation of damages. The father, on the other hand may prove promise of marriage, in order to increase his damages; and as he may recover exemplary, or punitive, damages, he may offer evidence of the fortune of the defendant, so that the jury, knowing the length of the defendant's purse, can decide how much damages will make him "smart for it." Being a minor (if over 15) is no defense to an action for seduction. (Graves' Notes on Torts; 13 Grat. 573, 726; 33 Grat. 722; 87 Va. 269.)

§ 3. Form of "description" in warrant or indictment.—

No. 1. SEDUCTION, UNDER PROMISE OF MARRIAGE OF A FEMALE OF PREVIOUS CHASTE CHARACTER

(Code, § 4410.)

DESCRIPTION:

"did, under promise of marriage to one E. F., an unmarried female of chastity and virtue, unlawfully and feloniously seduce and have illicit connection with, and carnal knowledge of, the body of her the said E. F."

No. 2. MARRIED MAN SEDUCING A FEMALE OF PREVIOUS CHASTE CHARACTER

(*Idem.*)

DESCRIPTION:

"being then a married man and having a lawful wife then living, did unlawfully and feloniously seduce and have illicit connection with, and carnal knowledge of, the body of one E. F., an unmarried female of chastity and virtue."

SET-OFF

- § 1. Payment or set-off may be proved in action for a debt
 - (1) Definition of set-off; distinguished from payment
 - (2) Both demands must be debt
 - (3) Demands must be due between same parties and in same right
 - (4) Both demands must be due and owing
 - (5) Acquisition of set-offs
 - (6) Application of set-offs
- § 2. Special plea of set-off or recoupment
 - (1) Recoupment distinguished from set-off
 - (2) Extent of the defense
 - (3) Illustrations

§ 1. Payment or set-off may be proved in action for a debt.—By section 6144 of the Code: "In an action for any debt, the defendant may at the trial prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed with the papers in the cause, as to give the plaintiff notice of its nature, but not otherwise. Although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt not to all but only to a

part of them, this section shall extend to such set-off, if it appear that the persons, against whom such claim is, stand in the relation of principal and surety, and the person entitled to the set-off is the principal. And when the defendant is allowed to file and prove an account of set-off to the plaintiff's demand, the plaintiff shall be allowed to file and prove an account of counter set-off, and make such other defense as he might have made had an original action been brought upon such set-off, and in the issue, the judge (if the case be tried without a jury), or the jury shall ascertain the true state of indebtedness between the parties and judgment shall be rendered accordingly."

(1) *Definition of set-off; distinguished from payment.*—Set-off is a counter demand of a debt growing out of another and separate transaction from that of the debt claimed by the plaintiff, which the defendant is allowed only by statute to assert against the plaintiff's demand (he being put on the footing of a plaintiff—§ 6149), and where it exceeds the plaintiff's debt, he recovers judgment against him for the excess (§ 6150). But the defendant is not obliged to set-off his counter demand; he may decline to do so, and file a separate action therefor, as he had to do at common law. It is otherwise as to payments, which differ from set-offs in being, by consent of the parties (express or implied), appropriated to the discharge of the debt in whole or in part; and so a judgment for the full amount of a debt settles all prior payments. (4 Min. Inst. 785-7; Burks' Pl. & Pr., §§ 230-1.)

(2) *Both demands must be debt.*—The statute says in any action for "a debt"; so the plaintiff's demand must be in the nature of a debt, that is, a liquidated claim, and not one merely for damages, such as a justice or a jury may assess. The debt may be equitable, as a bond, note, etc., assigned.

The set-off must also be a debt or in the nature of a debt, and not merely unliquidated damages. (4 Min. Inst. 787; Burks' Pl. & Pr., §§ 232-3.) For what is a liquidated demand, see "Burks' Pleading & Practice," and *Penalty*.

(3) *Demands must be due between same parties and in same right.*—A debt due from a partner cannot be set off against a partnership demand, nor *vice versa*; nor can a debt due to one as executor, administrator, or trustee, be set off

against one in his own right, nor *vice versa*. Where, however, principal and surety are sued in the same action, the statute (see above) permits the principal to set off against the plaintiff any claim he has against him, but the same privilege is not extended to the surety of a solvent principal. Where a contract is by an agent of an undisclosed principal, and a defendant deals with such agent supposing him to be the sole principal, if the action be in the principal's name, the defendant may set off claims against such agent acquired before knowledge that he was agent. (4 Min. Inst. 788-9; Burks' Pl. & Pr., § 233.)

(4) *Both demands must be due and owing.*—The debts on both sides must be due and owing at least at the time of the filing of the set-off. (4 Min. Inst. 789-90; Burks' Pl. & Pr., § 233.)

(5) *Acquisition of set-offs.*—As a general rule, under the statute (above), the defendant may, after he is sued and up to the time of filing his plea or list of set-offs—indeed up to the time of trial—acquire set offs against the plaintiffs, but if acquired after action brought the plaintiff may recover his costs even though the defendant should recover against the plaintiff for the excess of his set-off over the plaintiff's demand (Code, §§ 6149-50). (4 Min. Inst. 789-90; Burks' Pl. & Pr., § 234.) See, also, *Assignments*.

As to offsets in the case of the transfer of negotiable paper, see *Negotiable Instruments*, section 2, (2).

(6) *Application of set-offs.*—Where the set-off is to several bonds, notes, etc., assigned to different persons, the application is in the inverse order of assignment. Counter set-offs to the defendant's set-offs seems also admissible. (Burks' Pl. & Pr., § 235.)

§ 2. Special plea of set-off, or "recoupment."—By section 6145 of the Code: "In any action on a contract, the defendant may file a plea, alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or

to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter arising under the contract, existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea."

But this statute is not to impair or affect any bond or deed deemed voluntary (without valuable consideration)—Code, § 6147.

If such plea is not tendered, or if rejected, the defendant may still have relief in equity. (Code, § 6146.)

If the plea of set-off goes to part only of demand, judgment is given therefor and costs to the filing of the plea, and trial proceeds as to the rest. (Code, § 6148.)

The defendant is put on the footing of a plaintiff and may recover for any excess; and if the plaintiff is assignee of the original party to the contract, and the defendant's claim exceeds his, the defendant may waive for the excess, or he may have the assignor made a party, and obtain judgment against him for the excess. (Code, § 6150.)

(1) *Recoupment distinguished from set-off.*—Though the defenses here are often called set-offs or "equitable defenses," they are properly "recoupments." A set-off proper arises out of another transaction, while a recoupment is the reduction of the plaintiff's claim by reason of some delinquency or deficiency on his part. (4 Min. Inst. 786; Burks' Pl. & Pr. §§ 237-9.)

(2) *Extent of the defense.*—The statute enlarges the common law defense (which applied only to un-sealed instruments), embracing the instances enumerated, and "any other matter" of like kind arising out of the contract sued on. The defense here applies to matters of tort (or wrongs) as well as to contract. The defense cannot be made where the plaintiff's claim is not "on a contract." (4 Min. Inst. 792-3; Burks' Pl. & Pr., § 239.)

(3) *Illustrations.*—For illustrations, and further as to this special plea, see 4 Min. Inst. 795-9, and Burks' Pl. & Pr. (new edition).

SHERIFFS, SERGEANTS, CORONERS, CONSTABLES, AND CRIERS

(For particular duties, see particular titles)

- § 1. Their election and qualification
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§ 1. **Their election and qualification.**—Sheriffs are elected for four years, on Tuesday after the first Monday in November, every fourth year after 1919 (Code, § 132); sergeants for towns are elected for two years at such time as the charter may provide (Code, § 3026), and sergeants for cities are elected for four years, on Tuesday after the first Monday in November, every fourth year after 1921 (Code, §§ 129, 3026); coroners (who must be physicians) are appointed by the court for four years, on January 1, every fourth year after 1920 (Code, § 2815); one constable for each magisterial district (more if court thinks proper) is elected for four years, on Tuesday after the first Monday in November, every fourth year after 1919 (Code, §§ 127-8).

They qualify by taking the oaths and giving bond before the court, judge, or clerk. (Code, §§ 2696-8, 2815, 2818.) For appointment of a crier, and his bond, see Code, § 2821. As to the sheriff of city of Richmond, see Code, § 2814. Superintendent of fair grounds or cemetery have same powers as a constable for certain purposes (Code, § 2820). For appointment of policeman, with powers and duties of a constable at watering places, university or college, or manufacturing plant, see section 4805 of the Code. For powers and duties of a coroner, see *Coroner's Inquest*.

§ 2. Deputy sheriffs or sergeants, their appointment and powers.—A sheriff or city sergeant with the consent of his court, or consent in writing of the judge, may appoint one or more deputies, who may discharge any of the official duties of the sheriff or sergeant, unless expressly forbidden by law. They qualify by taking and subscribing the usual oaths of office. A deputy may be removed by the sheriff or sergeant, or by the court or judge. (Code, § 2701.) For powers of deputies of deceased sheriffs and sergeants, etc.—see Code, § 2816.

§ 3. When coroner may act in place of sheriff or sergeant.—He may do so, when there is no one acting as sheriff or sergeant, or deputy thereof, in the county or city, or when it is unfit for the sheriff or sergeant to act; but before receiving any money or serving an execution, he must give bond. (Code, §§ 2817-19.)

For when constable or crier may act in place of coroner, see Code, §§ 2819, 2821.

§ 4. Power to command assistance, in executing process; penalty for failure to obey.—Where resistance is made or feared, the officer may summon so many people as may be necessary, or require the commandant of any regiment in the county or city to call out such portion thereof as may be necessary, and a failure to obey subjects such person or commandant to fine or imprisonment, or both. (Code, § 2822.)

§ 5. Who privileged from arrest on civil process.—See Code, § 2823.

§ 6. When civil process not to be executed on Sunday.—Section 2823 provides: "No civil process shall be served on Sunday, except in cases of persons escaping out of custody, or where it may be specially provided by law."

§ 7. What obligations taken by officer void.—Any obligation taken by an officer by color of his office, of or for any person in his custody, otherwise than directed by law, is void (Code, § 2824).

§ 8. How process or notice served.—A summons or notice is served as provided in section 6041 of the Code—see *Notice*, section 1; except a process or notice to or against a corporation is served as provided in sections 6053--67—see *Corporations*, section 12. For service on carriers (not incorporated), see *Carriers (Private)*. See, also, *Process*, section 2.

§ 9. How, where, and when process to be returned; penalty for failure.—The officer should make return on the process of the day and manner of executing the same and subscribe his name thereto. A deputy should sign his own name as well as that of his principal. With the process the officer returns any bond taken, and an account of sales made under the same, specifying therein the several articles sold, to whom, and the prices. The return is to the court from which the process emanates or to which it is returnable, or in other cases not specially provided for, to the court of his county or city. Where a sale is made and no particular time is prescribed in the process or by statute, the return must be made within 30 days after the sale. (Code, § 2825.) See, also, *Executions*, section 8.

For penalties for failure to make return or for making false return, and procedure for same, see Code, §§ 2825-6.

§ 10. When fee to accompany process sent from another county.—See Code, § 2827.

§ 11. Officer may send process by mail; what evidence thereof.—See Code, § 2828.

§ 12. What receipts officer to give.—See Code, § 2829.

§ 13. Growing crops not liable to distress or levy, except, etc.—By section 2830 of the Code: "No growing crop of any kind (not severed) shall be liable to distress or levy except Indian corn, which may be taken at any time after the fifteenth day of October in any year, and also except sweet potatoes and Irish potatoes over five barrels of each variety may be distrained or levied upon after the same have been matured sufficiently to sever or to market."

§ 14. Unreasonable distress or levy prohibited; suste-

nance to be provided for live stock.—By section 2831 of the Code: "Officers shall in no case make an unreasonable distress or levy. For horses, or any live stock distrained or levied on, the officer shall provide sufficient sustenance while they remain in his possession. Nothing distrained or levied on shall be removed by him out of his county or city, unless where it is otherwise specially provided."

§ 15. **Sale of property.**—By section 2832 of the Code: "In any case of goods and chattels which an officer shall distrain or levy on, otherwise than under an attachment, or which he may be directed to sell by an order of a court, judge, or justice (unless such order prescribe a different course), he shall fix, upon a time and place for the sale thereof, and post notice of the same at least ten days before the day of sale at some place near the residence of the owner, if he reside in the county or corporation, and at two or more public places in the officer's county, city, or district. If the goods and chattels be expensive to keep or perishable, the court from whose clerk's office the writ of *feri facias* was issued, or the judge thereof in vacation, or the justice who issued the writ of *feri facias*, or the distress warrant under which the seizure is made, or if the distress warrant was issued by a clerk, the court of which he is clerk, or the judge thereof in vacation upon the application of any party on reasonable notice to the adverse party, his agent, or attorney, may order a sale of the property seized under such *feri facias* or distress warrant to be made upon such notice less than ten days, as to such court, judge, or justice may seem proper. At the time and place so appointed, such officer shall sell to the highest bidder, for cash, the said goods and chattels, or so much thereof as may be necessary."

§ 16. **Mules, oxen, and horses, when and where sold.**—By section 2833 of the Code: "If such goods and chattels be mules, work oxen, or horses, the sale shall be made after advertising the same for thirty days by hand bills posted at the front door of the courthouse and at five or more public places in the county or city, and when the sale is to take place in any county, the places for posting such notices must be at least two miles apart. Where the parties shall at or before the time for advertising the sale in writing authorize

the officer to dispense with the provisions of this section, then the sale shall be according to the preceding section."

§ 17. Adjournment of sale.—By section 2334 of the Code: "When there is not time, on the day appointed for any such sale, to complete the same, the sale may be adjourned from day to day until completed."

§ 18. When judgment against officer for money due from him; when judgment by officer or sureties against deputy.—See Code, §§ 2835-8.

For motions against officers on their bonds, see *Motions for Money*.

§ 19. Powers and duties of city and town sergeants; police force.—The city sergeant has the same powers and duties, and are subject to the same penalties, in his city, as a sheriff has and is subject to in his county (Code, § 2992); and a town sergeant has the same powers and duties, as a constable, within his town and for one mile beyond. (Code, § 3026). The officers of the town or city police force have the power and authority of constables, as to the criminal laws of the State and the city or town ordinances or regulations, along with certain duties enumerated (Code, § 2991).

As to special police, see Code, §§ 4797-4805; and *Justice of the Peace*, div. VIII., section 8.

§ 20. Allowance to city sergeant by court.—See Code, § 2993.

§ 21. Certain offenses against public justice.—Bribing an officer to prevent service of process, is punishable by jail not over six months and fine not over \$100 (Code, § 4502); officer voluntarily suffering prisoner to escape, in case of felony, is punishable by penitentiary 2 to 10 years (Code, § 4505); negligently doing so, or voluntarily suffering any other prisoner to escape, or wilfully refusing to receive a prisoner is punishable by jail not over six months, or fine \$50 to \$500 (Code, § 4506); officer refusing or wilfully and corruptly delaying to execute a process, whereby the accused escapes, is punishable by jail not over six months and fine not over \$500 (Code, § 4510); refusing to aid officer, when required, is punishable by jail not over six months and fine not over \$100 (Code, § 4511); extortion by an officer, is punishable by a fine not over \$50 (Code, § 4514); fraudulent

issue of fee bills by an officer is punishable by a fine not over \$500 (Code, § 4515); officer summoning a juror to act partially is punishable by a fine not over \$500, and forfeiture of his office and disqualification to hold office (Code, § 4519); any one obstructing justice by threats or force is punishable by a fine not over \$500, or jail not over 12 months, or both (Code, §§ 4525, 4782).

§ 22. Fees of sheriff, sergeant, coroner, crier, or constable.—See title *Justice of the Peace*, div. X. ("Costs before a Justice") section 1, sub-section (2) and (3), and section 2, sub-section (2) and (3); see also forms under that heading, section 3.

Every such officer is required to keep a fee book, wherein he shall enter the fees for every service performed, payments, etc. (Code, § 3494).

Fee bills should be made out and produced before payment; and improper fee bills are forbidden under penalty (Code, § 3495).

A fee bill of an officer duly signed may be delivered to any sheriff, treasurer in any magisterial district, or high constable, who is required to receive and endeavor to collect the same; and for this purpose he may distrain therefor (and the sheriff also for his fee bills), such property as an execution may be levied on—see *Justice of the Peace*, div. I. ("Warrants for Small Claims"); and garnishment proceedings are the same as in the case of taxes—see Code, § 2439.

Such officer shall account for any such fee within twelve months after its receipt, by returning such as he has not collected, with an endorsement thereon that the person charged with the fees has no estate in the county, corporation, or district out of which same could be made, and by paying over the amount of any not so returned, less 10 per cent. thereof for commission. If he fails to do so, judgment may be obtained, on motion, against him and his sureties, or their personal representatives, for the amount with which such officer is chargeable, and damages thereon not exceeding 15 per cent. per annum from the expiration of the said twelve months. Such judgment may be, on motion after notice, in the county, circuit, or corporation court of the officer's county or corporation.

But no fee bill shall be collected by distress, warrant, or suit after five years from the end of the year in which the service was performed that is charged therein, unless within that time it was returned with the officer's endorsement thereon (properly dated), in which case five years thereafter is the limitation. (Code, §§ 3498-3500.)

For how officer may have his fees taxed in the costs and noted in order or execution book, see Code, § 3501.

In case of a non-resident, or where previous fee bills have been returned unsatisfied, the officer may demand security for his fees (Code, § 3502).

For fees from treasury to sheriff or sergeant for attendance upon court, see Code, § 3503.

A sheriff or sergeant is not to charge for service of any public orders, nor for summoning and impaneling grand juries, nor for services in elections (except as provided in title 6 of the Code as to "Elections by the People").

No fee is allowed officer out of the treasury for services in proceeding against a person for disobedience of the process of court (Code, § 3514).

Nor is an officer paid out of the treasury in cases of the Commonwealth, unless otherwise provided (Code, § 3493).

For allowance to deputy sergeants in certain cities, see Code, § 3515.

§ 23. Various forms of motions and returns under this heading.—

**No. 1. NOTICE OF MOTION AGAINST AN OFFICER FOR CLERK'S FEES
COLLECTED**

(Code, § 3499.)

To Mr. R. R., Sheriff (or *Sergeant*) of the ——— of ———:

Whereas I, C. C., clerk of the ——— court for the ——— of ———, did, on the ——— day of ———, 192—, deliver to you my account of certain fees due to me as such clerk from persons residing in the said ———, amounting together to the sum of ——— dollars; and whereas, you have failed, within six months next after such delivery, to account with me therefor, and to pay me the said fees, abating such as were charged to persons who had no estate within your ———, out of which the same could be made, and abating also your lawful commission, notice is hereby given you, that on the ——— day of the next term of the ——— court for the ——— of ———, I shall move the said court for judgment against you, for the sum wherewith you are chargeable on account of the said fees, together with damages

thereon not exceeding ——— per centum per annum, from the expiration of the said six months till the judgment shall be discharged.

Dated this ——— day of ———, in the year 192—.

C. C.

NO. 2. NOTICE OF MOTION AGAINST OFFICER FOR FAILURE TO MAKE RETURN OF EXECUTION

(Code, §§ 2825-6, 2835, 6044, 6033-4 (before a J. P.).)

To Mr. X. Y., sheriff of ——— county:

Whereas, a writ of *feri facias* was issued from the clerk's office of the circuit court of said county, on the ——— day of, 192—, upon a judgment in my name against D. D., for ——— dollars, with interest thereon from the ——— day of ———, 192—, till paid, and ——— dollars costs, which writ was returnable to the first day of the then next term of the said court, and directed to you, the said sheriff; and whereas the same came into the possession of J. R., your deputy, and he has failed to return the same to the clerk's office whence it issued, on or before the return day thereof:

Notice is hereby given you, that on the ——— day of the next term of the circuit court of said county, I shall move the said court to fine you, according to law, for the failure to return the said execution.

This ——— day of ———, 192—.

P. P.

If the failure be continued, instead of "notice is hereby given," &c., say: "and whereas the said court, on the ——— day of ———, 192—, did impose upon you a fine of ——— dollars, for the failure to return the said execution, and the same being not now returned, notice is hereby given you, that on the ——— day of the next ——— term of the circuit court of said county, I shall move the said court to impose upon you a further fine, according to the statute in such cases provided, for your continued failure to return the said execution."

If the officer returns it, but fails to endorse his return, instead of "and he has failed to return," &c., say: "and he has returned to the clerk's office whence it issued, without noting thereon how he had executed the same: Notice is hereby given you, that on the ——— day of the next ——— term of the circuit court of said county, I shall move the said court to fine you, according to law, for the failure to make a proper return upon said execution."

P. P.

NO. 3. NOTICE OF MOTION AGAINST OFFICER FOR NOT RETURNING FORFEITED FORTHCOMING BOND

(Code, §§ 2825-6, 6520.)

To Mr. R. R., Sheriff (or *Sergeant*) of the ——— of ———:

Whereas, upon a judgment obtained in the ——— court for the ——— of ———, by me against one D. D., for, etc. (describe the judgment), a writ of *feri facias* was issued from the clerk's office of

the said court, on the — day of —, in the year 192—, returnable to the first day of the then next term thereof, which writ came into the possession of J. B., your deputy (‡), and was by him levied on goods and chattels of the said D. D. (*) who gave bond with S. S., his surety, to have the said goods and chattels forthcoming at the time and place of sale, but afterwards failed to deliver and have the same forthcoming, according to the condition of the said bond; and whereas the said J. B., your deputy as aforesaid, has failed to deliver the said bond to me, or to any one for me, although it has been demanded of him, and has also failed to return the same to the clerk's office aforesaid within thirty days after the forfeiture thereof, as required by law; notice is therefore hereby given you, that on, etc., I shall move the said court to fine you according to law, for the said failure.

Dated this — day of —, in the year 192—.

C. C.

No. 4. NOTICE OF MOTION AGAINST OFFICER FOR NOT RETURNING ACCOUNT OF SALES OF GOODS SOLD UNDER EXECUTION

(*Idem.*)

[As in last form to (*), and then say:] and whereas your said deputy, on the — day of —, 192—, made sale of the said goods and chattels, but has failed to return, in the manner and time required by the statute in that case made, an account of the sales made by him, in virtue of the said execution, notice is therefore hereby given you, that on, etc., I shall move the said court to fine you according to law, for the said failure.

Dated this — day of —, in the year 192—.

C. C.

No. 5. NOTICE IN SUCH CASE BY DEFENDANT IN EXECUTION

(*Idem.*)

To Mr. R. R., Sheriff (or *Sergeant*) of the — of —:

Whereas, upon a judgment obtained in the — court of the — of —, by one C. C. against me for, etc. [pursue No. 3 to (‡) and then say:] and was by him levied on my goods and chattels; and whereas your said deputy on, etc. (as in last form to end.)

No. 6. NOTICE IN SUCH CASE BY PURCHASER OF GOODS

(*Idem.*)

To Mr. R. R., Sheriff (or *Sergeant*) of the — of —:

Whereas, upon a judgment obtained in the — court for the — of —, by one C. C. against one D. D. for, etc. [as in No. 3 to (*) and then say:] and whereas, your said deputy on the — day of —, 192—, made sale of the said goods and chattels, and I became the purchaser of the same, but your said deputy has failed to return, etc. (as in form No. 4 to end).

No. 7. NOTICE OF MOTION AGAINST OFFICERS AND SURETIES FOR MONEY RECEIVED UNDER EXECUTION

(Code, §§ 2825, 2835, 6044, 6033-4 (before a J. P.).)

To Messrs. X. Y., sheriff of ——— county, and S. S., T. T. (or others), his sureties:

Whereas, a writ of *fiery facias* issued from the clerk's office of the circuit court of said county, on the ——— day of ———, 192—, upon a judgment in favor of P. P. against D. D., for ——— dollars, with interest from the ——— day of ———, 192—, till paid, and ——— dollars costs, which writ was returnable to the first day of the then next term of the said court, and directed to X. Y., sheriff of said county, upon which writ J. R., deputy for the said sheriff, made return that [here state the return]; and the money so returned, upon the said writ, as received by the said deputy has not been paid to me:

Notice is therefore given to each of you, that on the ——— day of the next term of the circuit court of said county, I shall move the said court for judgment against you jointly, for the money so returned upon the said writ as received, with interest thereon at the rate of fifteen *per centum per annum*, from the return day of the said writ till the judgment shall be discharged. C. C.

In case of notice by defendant *for surplus* arising from sale under execution, follow the above to "and the money so received," etc., in the last paragraph, and then say: "and there has been a failure to pay over to me the surplus money arising from the sale under the said execution, which surplus, after satisfying the said execution and all costs and charges of said sale, amounts to ——— dollars: Notice is [and so on as above, substituting "for the said surplus money," instead of "for the money so returned, upon the said writ as received," and signing "D. D." instead of "P. P."].

No. 8. NOTICE WHERE THE EXECUTION WAS DELIVERED TO THE OFFICER OF A COUNTY, ETC., WHEREIN CREDITOR DOES NOT RESIDE

(Code, §§ 6491, 6496.)

[Pursue No. 3 to (*) and then say:] and although in consequence of my not residing in the ——— of ———, I named ——— in that county (or *corporation*) to be my agent, for the purpose of receiving the money on the said execution, and gave him a written order therefor (the attorney at law of the creditor does not require a written order), yet the said money has not been paid, either to the said ——— or to me; and although the said ——— hath demanded payment from the said R. R., sheriff (or *sergeant*), as aforesaid, in his said county (or *corporation*) of the money so by the said deputy on the said writ returned levied as aforesaid, yet the said money has not been paid, either to the said ——— or to me. Notice is therefore given to each of you, that on, etc. (as in the preceding form to the end).

No. 9. NOTICE OF MOTION AGAINST OFFICER AND SURETIES FOR SURPLUS
ARISING FROM SALE UNDER EXECUTION

(Code, §§ 6495, 2825.)

To Messrs. R. R., Sheriff (or *sergeant*) of, etc., and S. S., T. T.,
etc. (naming them), his sureties:

Whereas, upon a judgment obtained in the ——— court for the
——— of ———, by C. C. against me for, etc. (describe the judgment),
a writ of *perit facias* was issued from the clerk's office of the said
court, on the ——— day of ———, in the year 192—, returnable to
the first day of the then next term, and directed to the sheriff (or
sergeant) of the said ——— of ———, upon which writ J. B., deputy
for the said R. R., sheriff (or *sergeant*) as aforesaid, made return
that, etc. (state the return), and there has been a failure to pay
over to me the surplus money arising from the sale under the said
execution, which surplus, after satisfying the said C. C., at whose
suit the said sale was made, and all costs and charges of such sale
amounts to ——— dollars. Notice is therefore hereby given to each
of you, that on, etc., I shall move the said ——— court for the ———
of ———, for judgment against you jointly, for the said surplus
money, with interest thereon after the rate of ——— per centum per
annum, from the return day of the said writ until the judgment
shall be discharged.

Dated this ——— day of ———, in the year 192—.

D. D.

No. 10. NOTICE OF MOTION OF SHERIFF AGAINST HIS DEPUTY

(Code, §§ 2836-8, 6044.)

To Mr. J. R.:

Whereas, on the ——— day of ———, 192—, judgment was rendered by the circuit court of ——— county in favor of P. P. against me, as sheriff of said county, for the sum of (here describe the judgment), for and on account of your default and misconduct as my deputy in the said office of sheriff:

Notice is therefore given you, that on the first day of the next
——— term of the said court, I shall move the said court for the
full amount of the judgment so rendered against me, and to award
execution for the same. This ——— day of ———, 192—.

X. Y., sheriff of ——— county.

No. 11. NOTICE OF MOTION BY SHERIFF, ETC., AGAINST DEPUTY AND HIS
SURETIES FOR OTHER MONEYS

(Code, §§ 2836, 6044.)

To Messrs. J. B., S. S., T. T. (naming deputy and sureties):

Whereas, the said J. B., who came into the office of deputy sheriff
(or *sergeant*) under me, R. R., the sheriff (or *sergeant*) of the ———

of ———, is found in arrears for the following money received, or which ought to have been received, by him by virtue of his office, and for which I, as his principal, am chargeable; that is to say, for, etc. (here specify the same). And whereas the said J. B. has not paid and delivered the said money to the person (or persons) entitled hereto, notice is therefore hereby given to each of you, that on, etc., I shall move the ——— court of the ——— of ———, to give such judgment against you jointly as I am liable for by motion or suit against me, on account and by reason of the said arrears, misconduct and default of the said J. B.

Dated this ——— day of ———, in the year 192—.

R. R.

No. 12. RETURN ON PROCESS OR NOTICE SERVED ON CITY OR TOWN
[See No. 13, under *Justice of the Peace*, div. I. ("Warrants for Small Claims").]

No. 13. RETURN ON PROCESS OR NOTICE SERVED ON OFFICER OF
CORPORATION
[See No. 28, under section 17, title *Corporations*.]

No. 14. RETURN ON PROCESS OR NOTICE SERVED ON AGENT OF CORPORATION
[See No. 29, under section 17, title *Corporations*.]

No. 15. RETURN ON PROCESS OR NOTICE SERVED ON INDIVIDUAL
[See No. 16, under *Justice of the Peace*, div. I. ("Warrants for Small Claims").]

No. 16. RETURN ON PROCESS OR NOTICE SERVED ON INDIVIDUAL BY
POSTING AT HIS RESIDENCE
[See No. 17, under *Justice of the Peace*, div. I. ("Warrants for Small Claims").]

No. 17. RETURN ON ATTACHMENT
[See No. 10, under *Justice of the Peace*, div. II. ("Attachments").]

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No. 18. RETURN ON SUMMONS, OR NOTICE, SERVED PERSONALLY ON A
NON-RESIDENT NATURAL PERSON

(Code, § 6071.)

State of _____,

County of _____, to-wit:

This day A. A. personally appeared before me, Y. Z., a notary public in and for the county and state aforesaid, and made oath that he is not a party to, or otherwise interested in, the subject matter in controversy in the within cause, that he served the within summons (or notice) on the _____ day of _____, 192—, by delivering a true copy of the same, in writing, to D. D., who is the defendant herein, in person, in the county of _____, and that the said D. D. is a non-resident of the State of Virginia.

A. A.

Subscribed and sworn to before me this _____ day of _____, 192—, in the county and state aforesaid; in testimony whereof, I have hereunto set my hand and seal the day, month and year last aforesaid.

[Put seal here]

Y. Z., Notary Public.

No. 19. RETURN ON SUMMONS, OR NOTICE, SERVED ON A COMMON CARRIER
THAT IS NOT A CORPORATION

(Code, § 6067.)

Executed on the _____ day of _____, 192—, by delivering a true copy of the within summons (or notice), in writing, to D. D., in person, who is a common carrier other than a corporation against whom this case is brought for a liability as such (or, who is an agent, driver, captain, or conductor of any vehicle of F. F., who is a common carrier other than a corporation, against whom this case is brought for a liability as such) in the county of _____, wherein this case was commenced.

E. J., Sheriff of _____ County.

No. 20. RETURN ON FIERI FACIAS WHERE MONEY IS MADE WITHOUT
LEVY

(Code, § 6491.)

I have made no levy of this writ, but on the _____ day of _____, 192—, I received from A. B., the defendant (or one of the defendants) mentioned herein, the amount of _____ dollars, of which I have retained the sum of _____ dollars for my commissions, and the balance, _____ dollars, I have paid to the plaintiff (or the plaintiff's attorney) as appears by his receipt hereon indorsed.

E. J., Sheriff of _____ County.

If only a part of the amount be received and the rest cannot be made, add "The balance of the amount herein mentioned cannot be made, because no effects can be found upon which this writ can be levied."

No. 21. RETURN ON FIERI FACIAS WHERE MONEY CANNOT BE MADE

(*Idem.*)

The money herein mentioned cannot be made. I have made no levy of this writ, because no effects can be found upon which it can be levied.

E. J., Sheriff of ——— County.

No. 22. RETURN ON FIERI FACIAS WHEN THERE IS A PRIOR EXECUTION AGAINST THE GOODS AND CHATTELS OF THE PERSON TO WHOM THE MONEY IN THE OFFICER'S HANDS IS PAYABLE

(*Idem.*)

I have made no levy of this writ, but on the ——— day of ———, 192—, I received from D. D., the defendant mentioned herein, the amount of ——— dollars which amount, less the sum of ——— dollars for my fee and commissions, I now hold in my hands. On the ——— day of ———, 192—, a writ of *fieri facias* was delivered to me against the goods and chattels of C. C., the plaintiff in this execution, in favor of A. A., from the Circuit Court of ——— county, for the sum of ——— dollars, in consequence whereof, I now bring into court the said sum of ——— dollars, received for the said C. C. under this execution, so that the court may dispose of the same.

E. J., Sheriff of ——— County.

No. 23. RETURN ON FIERI FACIAS WHEN INDEMNIFYING BOND IS GIVEN

(Code, §§ 6491, 2832-3, 6154.)

I levied this writ on the ——— day of ———, 192—, upon the following property (here specify it), and a doubt arising whether the said property is liable to such levy, I applied to the plaintiff for an indemnifying bond as provided for by law, which he gave, and the same is herewith returned. I advertised as the law directs that the said property would be sold at the court-house of the county of ———, on the ——— day of ———, 192—, between the hours of ten A. M. and four P. M.; and I posted notice of the time and place of said sale more than ten days before the said day of sale, at ———, a place near the residence of the owner of said property, and at ——— and ———, two public places in my county (for W. Va. substitute for this last clause: I also published notice of said sale more than ten days, by posting the same at the door of the said court-house, and at ———, a conspicuous place near the residence of the owner of the said property). On the ——— day of ———, 192—, within the hours aforesaid I made sale of the property at public auction to the highest bidder for cash, for the sum of ——— dollars, as is shown by an account of sales herewith returned, from which amount I have deducted ——— dollars for my fee and commissions, and the balance of ——— dollars I have paid to the plaintiff, as appears by his receipt hereon indorsed.

E. J., Sheriff of ——— County.

No. 24. RETURN ON FIERI FACIAS WHERE PLAINTIFF REFUSES TO GIVE INDEMNIFYING BOND, AND PROPERTY LEVIED ON IS RESTORED

(Code, §§ 6491, 6154.)

I levied this writ on the _____ day of _____, 192—, upon the following property (here describe it), and a doubt arising whether the said property is liable to such levy, I gave the plaintiff notice a reasonable time before the day appointed for the sale thereof, that an indemnifying bond as provided for by law would be required of him, which bond the plaintiff refused to give, and on the day appointed for the sale, I restored the property to the party from whose possession it was taken.

E. J., Sheriff of _____ County.

No. 25. RETURN ON FIERI FACIAS WHERE FORTHCOMING BOND IS TAKEN AND FORFEITED

(Code, §§ 6491, 6518, 6520, 6525.)

I levied this writ on the _____ day of _____, 192—, upon the following property of the defendant (here specify the property), and I appointed the _____ day of _____, 192—, at _____, to make the sale. C. D., the owner thereof, wishing the said goods and chattels to remain in his possession until the day of sale, I took a bond from him, with sufficient surety, to have the same forthcoming at the said time and place of sale. Notice of the time and place of sale was published and posted as the law directs. But, on the day of sale no part of the property was delivered, and the forthcoming bond being thereby forfeited, I return the same herewith.

E. J., Sheriff of _____ County.

No. 26. RETURN ON FIERI FACIAS WHERE LEVY AND SALE ARE MADE

(Code, §§ 6491, 2832-3.)

I levied this writ on the _____ day of _____, 192—, upon the following property of the defendant (here describe the property): I advertised as the law directs that the said property would be sold at the court-house of the county of _____, on the _____ day of _____, 192—, between the hours of ten in the morning and four in the afternoon; and I posted notice of the time and place of said sale more than ten days before the said day of sale, at _____, a place near the residence of the owner of said property, and at _____ and _____, two public places in my county. On the _____ day of _____, 192—, within the hours aforesaid, I made sale of the property at public auction to the highest bidder for cash, for the sum of _____ dollars, as is shown by an account of sales herewith returned, from which amount I have deducted _____ dollars for my fee and commissions, and the balance of _____ dollars I have paid to the plaintiff, as appears by his receipt hereon indorsed.

E. J., Sheriff of _____ County.

If the proceeds of the goods sold be more than sufficient to satisfy the plaintiff, substitute for the last clause in the above form the following: "from which amount I have deducted —— dollars for my fee and commissions, paid to the plaintiff —— dollars, as appears by his receipt hereon indorsed and the balance of —— dollars I have paid to the defendant, as will also appear by his receipt hereon indorsed."

SHOOTING

See *Animals, Fowls, etc.; Maiming or Mayhem*

§ 1. **Shooting at person in public place.**—"If any person unlawfully shoot at another person in any street in a city or town, or in any place of public resort, whether in a city or town, or elsewhere, he shall be confined in jail not exceeding one year, and be fined not exceeding \$1,000." (Code, § 4404.)

§ 2. **Shooting in or along road or street.**—"If any person shoot in or along any road, or within one hundred yards thereof, or in a street of any city or town, whether the town be incorporated or not, he shall, for each offense, be fined not less than \$5." (Code, § 4738.)

§ 3. **Shooting, etc., Antwerp and homing pigeons.**—See Code, § 4446.

SLANDER

(See "Burks' Pleading & Practice" (new ed.), title *Slander and Libel*.)

See *Libel*

- § 1. Definition
- § 2. Instances of slander
- § 3. Truth of words as a defense; apology in mitigation of damages
- § 4. General bad character of plaintiff as a defense
- § 5. Damages
- § 6. Slander or libel punished as a criminal offense

§ 1. Definition.—Slander is the speaking falsely words injurious to the reputation of another. By section 5781 of the Code, “all words which from their usual construction and common acceptance are construed as insults, and tend to violence and breach of the peace, shall be actionable,” and the jury shall decide whether the words are insults, regardless of any demurrer. All common law defamations or slander are insults (6 Grat. 534; 98 Va. 266).

The words need not, under the statute, be spoken to a third person; it suffices, if they are spoken to the plaintiff when he is alone, or are sent to him in a sealed letter; as, an insulting note sent to a woman proposing immorality. The statute applies to all words, whether written or spoken. (84 Va. 664; Graves' Notes on Torts.) If the words are written and published, they are libel—see *Libel*.

§ 2. Instances of slander.—Slander is, (1) where the words impute a criminal offense; (2) when they impute a contagious disease, calculated to exclude the party from society; (3) where the words affect one in his trade or calling by imputing the want of integrity or of capacity, mental, moral, or pecuniary, as, accusing a minister of adultery or a lawyer, of inability or dishonesty, or a tradesman, of fraudulent or dishonorable conduct or of being insolvent; or (4) where the words affect one's capacity for an office or trust held by him by imputing to him intellectual or moral unfitness.

At common law, in the above cases, an action lay without charging or proving special damage; while in other cases, special damage must be charged and proved, as in the case of the actual loss of a particular marriage, or the acquaintance or friendship of a specified person, or the loss of a situation, an inheritance, pecuniary advantage, or the like. But under the statute (see section 1, above), special damage need not be alleged or proved; and to call a person a “coward,” “hypocrite,” “scoundrel,” or any statutory insult, is actionable, the jury deciding whether the words are insulting. (4 Min. Inst. 460-7; Graves' Notes on Torts.)

§ 3. Truth of words as a defense; apology in mitigation of damages.—It is a perfect defense, or a mitigation of damages for the defendant to allege and prove the truth of

the words charged as slander; and (after notice in writing at the time of, or for, pleading) the defendant may show, in mitigation of damages, that he apologized to the plaintiff (Code, § 6240). But the truth of the words cannot be shown unless specially pleaded (113 Va. 156).

§ 4. General bad character of plaintiff as a defense.—This may be proved to reduce the damages. (5 Grat. 542; 8 Grat. 32; 16 Grat. 80.)

§ 5. Damages.—It is not necessary to prove actual pecuniary loss. There is no rule of law fixing the measure of damages; neither can they be calculated; the jury fix the amount, which may be such as to punish the defendant ("punitive"), as well as to remunerate the plaintiff. (116 Va. 326; 119 Va. 682.)

§ 6. Slander or libel punished as a criminal offense.—By Acts 1920, page 809: "If any person shall falsely utter and speak, or falsely write and publish, of and concerning any female of chaste character, any words derogatory of said female's character for virtue and chastity, or imputing to said female acts not virtuous and chaste, he shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than \$25, nor more than \$500, or imprisoned in jail not more than six months, or both such fine and imprisonment. And if any person shall falsely utter and speak, or falsely write and publish, of and concerning another person, any words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace or shall use grossly insulting language to any female of good character or reputation, he shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than \$5, nor more than \$100, or imprisoned in the county jail not exceeding sixty days, either or both.

The defendant shall be entitled to prove upon trial in mitigation of the publishment, the provocation which induced the libelous or slanderous words, or any other fact or circumstance tending to disprove malice, or lessen the criminality of the offense."

SMALLPOX

See Health

For general provisions as to smallpox and other dangerous diseases, see Code, §§ 1493, 1497, 1500, 1505, 1532; hospital for—§ 1560; transportation of dead—§ 1728; abandonment of sick person on shore of State—§ 4399.

SPECIAL COMMISSIONER

§ 1. **Appointment and bond.**—See Code, §§ 6266, 6269, 6271.

§ 2. **Payments to, and collection by.**—See Code, §§ 6272-3.

§ 3. **Rule against.**—See Code, §§ 6274-7.

§ 4. **When sheriff or sergeant to act as.**—See Code, § 6278.

§ 5. **Commissions for selling and collecting.**—5 per cent. in first \$300, and 2 per cent. on rest. (Code, § 6279.)

§ 6. **Commissioner appointed to execute a deed or writing.**—See Code, § 6296, as amended by Acts 1922, and § 6297.

SPECIFIC PERFORMANCE

Courts of equity will direct the specific performance of contracts as a general rule whenever courts of law can not supply an adequate remedy, that is, where mere damages are inadequate and an insufficient compensation, and it is immaterial whether the subject of the agreement be real or personal estate. Where courts of law however can furnish an adequate remedy they must be resorted to.

Before a court of equity will interfere and decree a specific performance of a contract it must appear that the contract was founded upon a valuable consideration either in

the form of a benefit bestowed upon, or disadvantage sustained by, the party in whose favor relief is sought, and this consideration it seems must be proved even though the contract be under seal, and though in a suit at law a seal imports consideration and consideration therefore need not be proven. A specific performance will not be decreed of a contract not based upon a strictly valuable consideration, as distinguished from a good consideration, such as an agreement to convey to a wife or child in consideration of the moral duty and affection existing towards them.

Specific performance of course will not be decreed where the contract is to do something that one is unable to do or which is contrary to law or equity. It will not be decreed unless the enforcement is necessary or is really important to the plaintiff and not oppressive to the defendant. Where damages recovered at law would answer his purpose as well as the possession of the thing contracted for, the party must sue in an action at law, not in equity for specific performance.

Mere inadequacy of consideration to be given for a thing will not prevent a decree in equity for the delivery and conveyance thereof, but if the inadequacy be so great as to induce a conclusion that fraud or imposition has been practiced, a court of equity will refuse to aid in the enforcement.

As to contracts required by law to be in writing under the statute of frauds, if they are not in writing, no decree of specific performance will be made, but if in writing it is immaterial in what form the instrument may be. It should be noted, however, that part performance of a contract not in writing will sometimes in equity take the case out of operation of the statute of frauds. It will do so where it would be a fraud upon the opposite party if the agreement under the circumstances should not be carried out in its entirety. An example of this is where one takes possession of land under a verbal contract for conveyance thereof to himself and makes improvements and expenditures thereon. A mere part payment of the purchase money or the entire payment thereof without improvements would not take the case out of the statute of frauds, and specific performance in

such case would not be decreed, but the party would have an adequate remedy in a suit for re-payment of the purchase money and for damages. In North Carolina and Texas it appears that even an entry and making improvements upon the land under a verbal agreement of purchase will not entitle one to a decree to compel a conveyance, but only to the value of the improvements, besides damages accruing for a violation of the agreement.

Even though a contract can not be performed in its entirety either by reason of an unexpected failure in the title to part of the estate, or of inaccuracy in the terms or the description of the property in the contract, or by reason of diminution in value on account of a charge against the same, yet if there are other circumstances entitling one to a decree of specific performance the decree will be made coupled with a direction as to just compensation for the defects, whenever this can be done with justice between the parties. (Hawkins' Legal Counselor, p. 553.)

STATE CORPORATION COMMISSION

See Common Carrier; Corporations; Insurance and Insurance Companies

- § 1. Powers and duties
- § 2. Rules as to demurrage, car service, and storage charges
- § 3. Rules of practice and procedure before the commission
 - (1) Public sessions
 - (2) Parties
 - (3) Petitions and complaints
 - (4) Notice
 - (5) Answers
 - (6) Amendments
 - (7) Stipulations or agreed facts
 - (8) Hearings
 - (9) Depositions and witnesses
 - (10) Argument
 - (11) Special matters
 - (12) General business

§ 1. Powers and duties.—The commission has general

supervision of all corporations, domestic or foreign, doing business in Virginia. It has full power and authority to require, by its rules, regulations and requirements, all corporations doing business in the State, to perform and discharge any public duty or requirement imposed by law, and may require them to furnish to the commission such reports as the law may provide; and they may enforce compliance by fine or other penalty imposed by law. They may require separate waiting rooms at all stations, wharves, and landings for the white and colored races. (Code, § 3716.)

They, also, fix rates, charges, etc., of transportation and transmission companies, and examine into their affairs and compel repairs, etc.; examine into any probable frauds in the issuance, sale, or promotion of any securities or contracts, or city, town or suburban lots; contract with transportation companies for the transportation of convicts and insane persons; issue all charters to domestic corporations; grant licenses to foreign corporations; perform all legal duties formerly vested in the Board of Public Works; and fix and prescribe storage, demurrage and car service charges. (Code, ch. 146, §§ 3693-3775, and Acts 1920 pp. 410, 99, amending §§ 3716, 3775, respectively, and Acts 1918, p. 108, supplanting § 3694, and providing for the election of the Commission by popular vote at election in November, 1919, and every fourth year thereafter.)

For other special acts since the Code, see Acts 1918, p. 452 (imposing fine on railroad companies leaving bushes and trees at public crossings); Acts 1918, p. 459, amending § 393 (as to printing and distribution of its annual reports); Acts 1918, p. 467, amending §§ 3774, 3928 (as to payment of storage, demurrage and car service claims—see, also, *Common Carrier*); Acts 1918, p. 662; 1920, p. 414 (as to small loans—see, also, *Loans Not Over \$300*); Acts 1918, p. 673, amending §§ 4064-6 and Acts 1920, p. 232 (as to public utilities); Acts 1918, p. 676; 1920, p. 536 (duties under “Blue Sky Law,” or illegal dealing in State securities); Acts 1918, p. 683 (as to taxation of certain public service corporations); Acts 1920, p. 61 (as to industrial loan associations—see, also, *Building and Loan and Industrial Loan Associations*); Acts 1920, p. 363 (as to mutual insurance companies); Acts 1920, p. 400 (requiring certain equipment on railroads).

While it is within the judicial jurisdiction of the Commission to enforce all statutes imposing public duties upon public service corporations (106 Va. 61), the Commission has not power to require a railroad to grant the use of its track and terminal facilities to another such company (111 Va. 59); cannot remove individual inconveniences to shippers so long as the carrier affords reasonable facilities for the reception and delivery of freight for the general public and denies no individual an essential right (111 Va. 623); nor regulate franchises which have no relation to public service, e. g., in furnishing electric light to individuals and towns, or in regulating the charges for furnishing electricity for light purposes (11 Va. L. R. 744); but see, now, *Public Utility Companies*. The Commission may, if it deem it reasonable and expedient in order to promote the security and accommodation of the public, compel an electric railway to purchase and put in operation new motor cars; to put new motors on old cars in service; to install on its cars modern electric heating apparatus; to lay and operate a double track; to run its cars according to its public schedules; and to inaugurate and maintain a proper system of inspection of its properties (10 Va. L. R. 1008).

§ 2. Rules as to demurrage, car service, and storage charges.—See *Common Carrier*, section 9.

§ 3. Rules of practice and procedure before the commission.—The following rules have been promulgated by the Commission.

(1) *Public sessions.*—The regular public sessions of the Commission, sitting as a court, for the hearing of contested cases and matters properly coming before it, will be held at its offices, in the city of Richmond on the second Monday in January, April, June, September and November in each year. These sessions may be adjourned from time to time, and shall last so long as the business before the Commission and the public interests may require. These sessions may be adjourned during their respective terms, to any other place in the State, upon order of the Commission, that the public necessity or the convenience of the parties require.

Special judicial sessions of the Commission may be held at any time upon order of the Commission, or a majority of

its members, in the city of Richmond, or elsewhere in State, for the hearing of all matters over which the Commission has jurisdiction.

(2) *Parties.*—All complaints, proceedings, contests or controversies before the Commission shall be instituted in the name of the Commonwealth as complainant and the party against whom the complainant is preferred, or the proceeding instituted, shall be the defendant; in all proceedings instituted by the Commission, of its own motion, the complainant shall be, "The Commonwealth at the relation of the State Corporation Commission," in all other complaints and proceedings instituted by parties, the complainant shall be styled "The Commonwealth at the relation of———."

Any person, firm, corporation or association, or any commercial body, may institute a complaint before the Commission. When instituted by an unincorporated association or mercantile body the complaint must be in the name of a committee of not less than two persons on behalf of such association or body.

When the complaint concerns anything done, or omitted to be done, by a single carrier or other corporation, no other need be made a party, but if it relates to joint tariffs, or questions in which two or more carriers or other corporations are interested, all such must be made parties. A complaint may embrace several carriers, or lines of carriers, operated separately, in the same proceeding, when the subject matter of the complaint involves substantially the same violation of the law, or of the rules and regulations of the Commission, by the several carriers or lines. Persons or carriers not originally parties may apply, in any pending case or proceeding, for leave to intervene, and to be heard upon the questions involved. Such application must be by petition, verified by oath, which must set forth the petitioners' interest in the proceedings.

(3) *Petitions and complaints.*—All complaints for the redress of alleged grievances or violation of law by the defendant must be in writing and addressed to the Commission. Such petition or complainant must distinctly and plainly set forth the grounds of complaint, the items being numbered. and the petition or complaint must be verified by affidavit.

The name of the corporation, or other parties complained against, must be stated in full, and the address of the complainant with the name and address of his attorney or counsel, if any, must appear upon the petition, when the complaint is made otherwise than on the motion of the Commission. Two copies of such complaint or petition shall be filed therewith, and if there be more than one defendant named therein two additional copies shall be filed for each such additional defendant.

(4) *Notice.*—The petition or complaint may be filed before the Commission, or with its clerk, and, thereupon a notice, in the form of a writ, shall be issued, according to law, by the Clerk, directed to the Bailiff of the Commission or other proper officer, summoning the defendant or defendants to appear before the Commission on the day named therein, which shall be not less than ten days from the filing of the complaint. The said writ and notice and a copy of the complaint shall be served upon the defendant or defendants, and return made according to law.

(5) *Answers.*—Upon the day named in the writ, or notice, the defendant or defendants shall file before the Commission an answer in writing, with two additional copies thereof, specifically admitting, or denying, by items, the material allegations of the complaint, and setting forth the facts which will be relied upon to support any such denial. The answer shall be verified by affidavit, and be signed by the attorney or counsel, if there be such. If the parties are ready, upon the filing of the answer, the Commission may proceed at once to hear the matter of contest. If either party be not prepared for the hearing, then an adjournment may be had and the day for the hearing fixed, upon the application of either party, in the discretion of the Commission.

Instead of answering the complaint, defendant or defendants may demur to the same, filing a demurrer in writing on the return day.

(6) *Amendments.*—Upon the application of any party, amendments to any complaint or answer in any proceeding or investigation may be allowed by the Commission, in its discretion.

(7) *Stipulations or agreed facts.*—The parties to any

complaint or proceedings before the Commission may, by stipulation in writing, filed with the Commission, agree upon the facts, or any portion thereof, involved in the controversy, which stipulation shall be recorded and used as evidence on the hearing. It is desired that the facts be thus agreed upon whenever practicable.

(8) *Hearings*.—Upon the filing of the answer, the hearing will proceed at once, or the Commission will assign the time and place for the same. Witnesses will be examined orally before the Commission, unless testimony or facts are agreed upon, as otherwise provided in these rules. The petitioner or complainant must prove the existence of the facts complained of, unless they are admitted, or the defendants be in default by failing to answer. Facts alleged in the answer must be proved by the defendant or defendants, unless admitted by complainant. In cases of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case may require.

(9) *Depositions and witnesses*.—The testimony of any witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Commission after the same is at issue by the filing of the answer. Such depositions must be after notice, and before the officer required and allowed by the statutes of Virginia. Any party, complainant or defendant shall be entitled to process to compel the attendance of witnesses or the production of books and papers before the Commission. Such process will be issued, for proper service and return by the clerk of the Commission, upon application of any party to the proceeding. When depositions are taken they must be returned to the clerk of the Commission, as depositions are required by law to be returned to the clerk of a court of chancery.

(10) *Argument*.—Whenever requested by the proper authorities, the Attorney-General of the State may represent the complainant in any proceeding.

Arguments may be made orally before the Commission or written or printed briefs may be filed in any case within such time as may be prescribed by the Commission in such case. For convenience in reading and filing, it is requested

that, whenever practicable, in cases of importance, arguments be printed.

(11) *Special Matters.*—In the performance of special functions of a judicial nature, imposed upon it directly by law, and not instituted by any complainant, such as the assessment of property of corporations and other like matters, such notices will be given and proceedings be had, as are required by the statutes under which the Commission acts in the performance of such duties.

(12) *General business.*—The acts of each of the several members of the Commission and of each of its clerks, officials, employees and agents, done in the performance of the administrative and executive duties and functions required of the Commission by laws which are mandatory, and as to which no discretionary powers are vested in the Commission, are hereby authorized, ratified, approved and adopted as the acts of the Commission. Effective December 15th, 1918, the offices of the Commission, its bureaus and divisions, in the Capitol Building and elsewhere located in the City of Richmond, will be open for the transaction of business on week days' from eight o'clock in the morning until four-thirty o'clock in the afternoon between the first day of April and the first day of November, and from nine o'clock in the morning until five o'clock in the afternoon during the rest of the year, Sundays and legal holidays excepted. Applications for charters and all papers to be presented to or filed with the Commission may be left with the Clerk of the Commission. Official communications by mail should be addressed to the "State Corporation Commission," and not to the Chairman or any member of the Commission individually.

STATE NORMAL SCHOOLS

For State Normal Schools, for white women, at Farmville, Harrisonburg, Fredericksburg, and Radford, see Code, §§ 939-46. For Virginia Normal and Industrial Institute, for colored pupils, near Petersburg, see Code, §§ 947-69.

For general provisions as to colleges, etc., see Code, §§ 986-1003.

STATE OFFICERS AND BOARDS

§ 1. **Election.**—See Code, §§ 118-19.

§ 2. **Vacancies, how filled.**—In the office of Governor or Lieutenant-Governor—see Code, §§ 120-1; Attorney-General—Secretary of the Commonwealth, and State Treasurer—§ 122, as amended by Acts 1920, p. 11; Auditor of Public Accounts, Second Auditor, Register of the Land Office, and Superintendent of Public Printing—§ 331; Commissioner of Agriculture—§ 1104; Commissioner of Insurance—§ 4171; Commissioner of Prohibition—Acts 1918, p. 601; other State officer not otherwise provided for—§ 332.

§ 3. **Appointment, etc., of officers at seat of government.**—See Code, §§ 323-42, and Acts 1920, p. 363, amending § 340.

§ 4. **Governor.**—For general powers and duties, see Code, §§ 313-22. For Act establishing an executive budget system, see Acts 1918, p. 118.

§ 5. **Secretary of the Commonwealth.**—For general duties, and the State and certain other libraries, see Code, §§ 343-74, and Acts 1918, p. 409 (allowing officials to deposit records in the State Library). For act for distribution of the Code, see Acts 1918, p. 211.

§ 6. **Attorney-General.**—For general duties, see Code, §§ 375-8.

§ 7. **Superintendent of Public Printing, and Joint Committee.**—See Code, §§ 379-401, and Acts 1922, amending §§ 381-5, and Acts 1922, repealing § 399.

§ 8. **Register of the Land Office.**—See Code, §§ 402-13.

§ 9. **State Forester.**—See Code, §§ 523-549, and Acts 1920, p. 614, amending §§ 526, 530, 540-2, and adding §§ 546a and 546b.

§ 10. **State Accountant and State Board of Accountancy.**—As to State Accountant, see Code, §§ 550-565; State Board of Accountancy, §§ 566-72. State Accountant to make biennial inspections of accounts of city and county officers handling State funds—Acts 1920, p. 387.

§ 11. **Director of Legislative Reference Bureau.**—See Code, §§ 573-80.

§ 12. **Art Commission.**—See Code, §§ 581-5, and Acts 1920, p. 393, amending § 582, and Acts 1922, amending § 581.

§ 13. **State Live Stock Sanitary Board.**—See Code, §§ 906-20.

§ 14. **State Highway Commission.**—See *Roads, Bridges, Landings and Wharves.*

§ 15. **Board and Commissioner of Agriculture.**—See *Agriculture.*

§ 16. **Dairy and Food Commissioner.**—Code, §§ 1155-1228, and Acts 1918, pp. 483, 458, affecting §§ 1158, 1222, respectively, and Acts 1920, p. 547, amending § 1215; see *Pure Food and Drug Laws.*

§ 17. **State Board of Public Welfare, formerly called State Board of Charities and Corrections.**—See *Minors, etc.*, section 37, (6).

§ 18. **State Board of Health.**—See Code, §§ 1486-91, and Acts 1918, p. 178, affecting §§ 1489-90, and Acts 1920, p. 87, amending § 1486.

§ 19. **Boards of directors and visitors of State institutions.**—See Code, §§ 1096-8.

§ 20. **State Tax Board and Examiner of Records.**—See Code, §§ 2213-25, and Acts 1918, p. 446, amending § 2222, and Acts 1920, p. 836, amending § 2224.

§ 21. **Superintendent of Public Instruction and State Board of Education.**—See *Education.*

§ 22. **State Board of Crop Pest Commissioners.**—See Acts 1922, p. —, and *Orchards, etc.*

§ 23. **Salaries, mileage, and other allowances.**—See Code, §§ 3431-77, and Acts 1918, p. 685, amending §§ 3463, 3465-8, and Acts 1920, p. 493, amending § 3434; p. 85—§ 3435; p. 500—§ 3437; pp. 531 and 11—§ 3464; p. 11—§ 3465; p. 11—§§ 3466-7; and Acts 1922, amending § 3468.

§ 24. **What contracts by, forbidden.**—See Code, § 4706.

§ 25. **Garnishment of.**—See Code, § 6559.

§ 26. **Board members not to hold other positions in an institution.**—For an Act "To prohibit members of the governing boards of institutions, supported in whole or in part by funds paid out of the State treasury, and rectors of such institutions, and presidents and chairmen of the governing boards thereof, from holding, during their terms of office, any other office or position with the institutions on the boards of which they are serving," see Acts 1922, p. —.

§ 27. **Hampton Roads Port Commission.**—For an act “To create the Hampton Roads Port Commission, define its duties and powers, to provide funds for carrying on its work, and to require certain reports from the Board of Pilot Commissioners,” see Acts 1922, p.—.

STATE OR COMMONWEALTH

See State Officers

§ 1. **Jurisdiction.**—For territorial limits of Virginia and nature of compacts with adjoining states, see Code, §§ 9-16; and Acts 1918, p. 575 (an act to locate and mark a part of the State line between Virginia and Kentucky).

For jurisdiction over lands acquired by the United States for various purposes, survey of the coast, maps, and charts, see Code, §§ 17-26, and Acts 1918, p. 568 affecting § 19.

§ 2. **Seals and flags of the Commonwealth.**—See Code, §§ 27-33.

§ 3. **Recovery of debts due the State.**—See Code, §§ 2510-42.

§ 4. **Claims against the State.**—See Code, §§ 2578-83, See also, *Treasury, Auditors, and Treasurer.*

§ 5. **Public debt.**—See Code, §§ 2584-2641, and Acts 1920, p. 539, 360, amending §§ 2591, 2601, respectively.

STATUTES

(See 1 Minor's Inst. 44-51; and Lile's Notes on Statutes.)

- § 1. When statutes take effect
- § 2. Public and private, and general and local or special statutes
- § 3. Declaratory and remedial statutes
- § 4. Mandatory and directory statutes
- § 5. Prospective and retrospective statutes
 - (1) Prospective statutes

- (2) **Retrospective statutes**
 - (a) **Ex post facto laws**
 - (b) **Retrospective laws affecting civil rights**
 - (c) **Retrospective laws affecting remedies**
- § 6. **Foreign statutes**
- § 7. **Constitutional formalities**
 - (1) **In general**
 - (2) **Title of acts**
- § 8. **Common law rules of construction**
- § 9. **Statutory definitions and rules of construction**
- § 10. **Repeal of statutes**
 - (1) **By new law or Code as to liabilities or punishment**
 - (2) **Repeal not to revive former statute**
 - (3) **Repeal of validating statutes**
 - (4) **Effect of Code**

§ 1. When statutes take effect.—Statutes in general take effect 90 days after the adjournment of the legislature, except laws passed as emergency acts or a general appropriation act may be made to commence from passage or at such time as may be named. (Va. Const., § 53; Code, § 4.)

§ 2. Public and private, and general and local or special statutes.—Statutes are either public, i. e., those which affect the public at large or all of a certain class, in the whole State or in the limits of a particular locality; or private,—i. e., those affecting particular persons as individuals, and not as members of the community or of a particular class.

General statutes (as contrasted with local) are such public statutes as operate throughout the State, whether applying to all persons or to all of a particular class; while local statutes are those whose operation is confined to a restricted territory, and while local statutes may be either public or private, they are usually called public statutes.

The courts take judicial notice of public or general statutes, while private or local statutes though they need not be specially pleaded (Code, § 6190), yet they must be proved.

General statutes (as contrasted with special) imports application to all of a certain class of persons or subjects, while special legislation applies to a portion of the class only. (Lile's Notes on Statutes.)

Section 63 of the Virginia Constitution prohibits the legislature from passing private, local, or special legislation in certain cases (see 108 Va. 902).

§ 3. Declaratory and remedial statutes.—A declaratory

statute is one whose purpose is to settle a doubt as to what is the common law in a particular case, or to explain the meaning of a prior statute; while a remedial statute is one intended to alter the old law, by extending or restricting its operation, or by establishing a new rule. (Lile's Notes on Statutes.)

§ 4. Mandatory and directory statutes.—A statute is mandatory, when its command is such that a failure to comply renders acts done under it absolutely void; while a statute is directory when compliance with its provisions is discretionary, or when, under legal rules of interpretation, it is evident that compliance was not intended by the legislature to be a condition that must precede the validity of acts done thereunder; the general test to decide which is to consider whether the prescribed mode of action is of the essence of the thing to be accomplished, i. e., whether it is a matter of substance, or of convenience only. Statutes prescribing duties by public officials are more readily held to be directory, while those evidently intended for the protection of private rights, are generally mandatory. (Lile's Notes on Statutes.) For rules of construction, see section 8, below.

§ 5. Prospective and retrospective statutes.—(1) *Prospective statute.*—A prospective statute is one applicable only to cases arising after its enactment.

(2) *Retrospective statutes.*—A retrospective or retroactive statute is one operating retroactively, and therefore affecting past transactions. These are not favored by the courts, and are not so construed unless they are plainly so intended. Retrospective statutes are of three kinds:

(a) *Ex post facto laws.*—The term *ex post facto* ("after the act done") is confined to criminal laws. An *ex post facto* law is one which inflicts punishment for an act innocent when committed; or which changes the manner of punishment after the act is committed; or which increases the degree of punishment; or which changes the rules of evidence, by which less or different testimony is sufficient to convict; or which alters the methods of trial to the prejudice of the accused. But an act enlarging the competency of witnesses is not *ex post facto*. *Ex post facto* laws are prohibited by the State and Federal Constitutions (Va. Const., § 58; U. S. Const. Art. I., § 9, cl. 3), and are therefore void.

(b) *Retrospective laws affecting civil rights.*—These may be: (1) Laws impairing the obligation of contracts, which the Federal Constitution prohibits (Art. I., § 10, cl. 1) the States to pass, and which would be void; as, the repeal of a grant of land; extension of the time for the enforcement or redemption of mortgages; homestead exemption laws as applied to existing debts; or, generally, taking away or materially impairing vested property rights: or (2) curative legislation, which do not impair the obligation, of contracts, or vested rights, which are valid, although they may seriously affect existing rights; as, statutes validating as between the parties, contracts void or voidable by reason of personal incapacity or legal informality; or taking away the defense of usury, or illegality; or remitting penalties. These propositions rest on the principle that one has no vested right in a mere rule of law—and certainly no vested right to do wrong.

As to third persons, where, by reason of the original invalidity of a contract or conveyance, adverse contract rights of third persons have in the meantime attached, subsequent legislation will not be permitted to impair such rights; as, a deed of trust to secure creditors, void as to other creditors and purchasers because not duly recorded, cannot be validated so as to displace the priority of other contract liens accrued before the passage of the act.

(c) *Retrospective laws affecting remedies.*—These are not only valid but free from objection, unless they are ex post facto, or impair the obligation of contracts; thus, equitable pleas may be provided, the competency of witnesses enlarged, other courts established or the preliminary examination of the accused abolished. (Lile's Notes on Statutes.)

§ 6. Foreign statutes.—By a recent act (Acts 1918, p. 315): "Whenever in any case it becomes necessary to ascertain what the law, statutory or otherwise, of another State or country, or of the United States is or was at any time, the court, judge or other judicial officer or tribunal shall take judicial notice of and may consult any book of recognized authority purporting to contain, state or explain the same, and may consider any testimony, information or argument that is offered on the subject."

§ 7. Constitutional formalities.—(1) *In general.*—If any constitutional requirement for the due enactment of a statute be omitted, the statute is in general invalid; yet the legislative journal is a record and imports absolute verity, and the courts will not hear evidence to impeach its accuracy; though if it fails to show affirmatively what the Constitution expressly declares it shall show, the irregularity is fatal; but where formalities are not required to appear from the journal it will be presumed that the other “house” has done its duty and obeyed the mandate of the supreme law.

(2) *Title of acts.*—The Constitution (§ 52) provides that “no law shall embrace more than one object which shall be expressed in its title; nor shall any law be revived or amended with reference to its title, but the act revived, or the section amended, shall be re-enacted and published at length.” Non-compliance herewith makes the statute void.

While two or more distinct and unrelated objects can not be included in one act, yet it is admissible, as our Court of Appeals says, “If the subjects embraced in the statute, but not specified in the bill, are congruous (in agreement and harmonious), and have natural connection with, or are germane (or kindred or related) to the subject expressed in the title (91 Va. 762, 772).” If the act has one general object which is fairly indicated in its title, it is sufficient, although there be many details not appearing in the title. It is not needful that the title contain a full abstract or index of the contents of the act.

In a general revision of a Code, the compilation is regarded as a single act, and the general title indicating the object to be “to revise, arrange, and consolidate into a Code the general statutes of the Commonwealth,” is sufficient (91 Va. 762, 775; 108 Va. 902).

If the act be amendatory of a section of the Code, reference may be made to the section by number. Only that section or act needs to be re-published, or re-enacted.

Such parts of an act as do not violate the constitutional provision may be sustained, if they can be separated from the invalid parts; but if the result of such separation be to give the act a meaning wholly different from that intended by the legislature, the whole act is void. An inde-

pendent act complete in itself, though not purporting to amend a previous act, does not violate the Constitutional provision requiring re-publication at length though the effect be to amend the prior statute. (Lile's Notes on Statutes.)

§ 8. Common law rules of common construction.—In construing statutes, the following common law rules should be observed: (1) Where a statute treats of persons or things of inferior rank, it cannot by general words be extended to those of a superior rank; (2) penal statutes should be strictly construed, but not so as to defeat the clear intention; (3) remedial statutes, as, statutes against frauds or gambling should be liberally construed; (4) one part of a statute should be construed by another; (5) "may" should be construed as "must" or "shall," where the legislature is imposing a positive duty, and not merely a discretionary power; (6) a savings or exceptions totally repugnant to the body of the act is void, but they must be reconciled if possible; (7) where the common law and a statute differ, the common law, of course, gives place to the statute; and an old statute gives place to a new one, but they should be reconciled if possible; (8) a statute contrary to the Virginia or United States Constitution is void; (9) the motives of the legislature, as fraudulent or otherwise, cannot be inquired into by the courts; (10) the common law be repealed by a statute which is itself afterwards repealed, the common law is thereby revived; (11) acts seeking to bind or limit the powers of subsequent legislatures are of no force; (12) in general revisals of Code, the old law is not construed as altered, unless such intention plainly appears in the new Code. (Lile's Notes on Statutes.)

§ 9. Statutory definitions and rules of construction.—The Code of Virginia (§ 5), provides that "in the construction of this Code, and of all statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature," which we abbreviate as follows: (1) "*State*" refers also to District of Columbia and territories, and United States includes them likewise.

(2) "*Governor*" is equivalent to "the executive power

of the Commonwealth," or to "the person having the executive power"; "*justice*" or "*justices*," construed as if "of the peace" followed, and "notary" or "notaries," as if "public" followed. "Justice" or "justice of the peace," in the singular or plural, includes any officer (as, a mayor or police justice or civil and police justice) possessing the jurisdiction and exercising "the powers and authority of a justice of the peace in criminal matters."

(3) Words giving *authority to three or more officers or persons*, gives it to a majority, unless otherwise expressed.

(4) "*Personal representative*" includes an executor, administrator of different kinds, or sheriff, sergeant, or other officer acting as such, or other curator or committee of the estate of a deceased person.

(5) "*Insane person*" includes an idiot, lunatic, non compos, or deranged.

(6) "*Oath*," "*swear*," or "*sworn*," same as "affirmation," "affirm," or "affirmed."

(7) "*Month*" means calendar month, and "*year*" calendar year; and year alone, same as "year of our Lord."

(8) *Notice, etc.*—Where a statute requires a notice to be given, or any other act to be done before any motion or proceeding, the day of such motion or proceeding is not counted, but the day of such notice or act is counted.

(9) *Sunday*.—Where a court or other proceeding is directed by law to take place on a particular day, and that day is Sunday, it shall take place the next day; and where an adjournment from day to day is authorized, an adjournment from Saturday to Monday is legal.

(10) "*Land*" or "*lands*" or "*real estate*" includes "lands, tenements, and hereditaments (i. e., anything that may be inherited), and all rights thereto and interests therein, other than a chattel interest (such as leases, mortgages, growing crops, etc.); and "personal estate" includes chattels real (such as leases, mortgages, growing crops, etc.), and such other estate as, upon the death of the owner without a will, would devolve upon his personal representative.

(11) "*Written*" or "*in writing*" includes printing, or other representation (as, typewriting, etc.); and "per cent." means "per centum."

(12) "*Seal*," in respect to any corporation, court, or public office, includes an impression of such official seal made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto; and in respect to a "natural person" (i. e., a person other than a corporation), "a scroll by way of seal" is sufficient.

(13) *Singular words* also refer to several persons or things, and *vice versa*; words of *masculine gender* include females and corporations; and "person" refers to "bodies politic and corporate" (i. e., the government or political divisions thereof, and corporations), as well as to individuals.

(14) "*Preceding*" and "*following*" refer to next preceding and next following.

(15) *Ordinances, by-laws, rules, regulations, and orders*, of councils, corporation, board, etc., must not be contrary to the laws or constitution of the State or of the United States.

(16) "*City*" means "an incorporated community" of at least 5,000 inhabitants, or one which had a city charter at the adoption of the constitution in 1902; "town" is any other incorporated community; "*council*" includes any body or bodies authorized to make ordinances for a city or town.

(17) "*Corporation court*" embraces hustings courts, and in Richmond Hustings Court, Part I, unless otherwise stated.

(18) "*Horse*" includes a mare, or a gelding (i. e., a castrated or changed horse).

(19) "*Railroad*" and "*railway*," with or without "company" means the same, in statutes or court proceedings. (See also § 3881 of Code). For meaning of "public service corporation," "transportation company," or "transmission company," in the act as to, see *Corporations*, section 2.

(20) *Black-faced section headings* of the Code are not titles or parts of the sections, even when included in amendments or re-enactments, unless expressly so provided (§ 5, cl. (20).)

(21) In the "*Partnership Act*," (Acts 1918, pp. 541-55), "court" includes "every court or judge having jurisdiction in the case"; "business" includes "every trade, occupation or profession"; "person" includes "individuals, partnerships, corporations and other associations"; "bankrupt" includes

"bankrupt under the Federal bankruptcy act or insolvent under any State insolvent act"; "conveyance" includes every assignment, lease, mortgage, or encumbrance"; "real property" includes "land and any interest or estate in land."

As to "Partnerships," and also "Limited Partnerships" (Acts 1918, pp. 364-72), the rules of construction are: (1) The rule that statutes in derogation of the common law are to be strictly construed does not apply to these acts; they are to be so construed as to effect their general purpose to make uniform the laws in the State; and they are not to be construed so as to impair the obligation of existing contracts, nor to affect any existing right or pending proceeding; and as to the act as to partnerships generally, it is provided that the law of estoppel and the law of agency shall apply.

§ 10. Repeal of statutes.—(1) *By new law or Code as to liabilities or punishment.*—A new law or the Code is not to be construed to repeal a former law, as to any offense committed against the former, nor as to any act done, or penalty, etc., incurred, or any right accrued, or claim arising under the former law, or in any way to affect the same before the new law takes effect, except the proceedings thereafter shall conform so far as practicable to the new laws; and if any penalty, etc., be mitigated or lessened, the accused may avail himself of the lesser penalty, etc. (Code, §§ 6 and 6569-70).

(2) *Repeal not to revive former statute.*—When a statute repealing another has itself been repealed, the previous law is not thereby revived without express words to that effect, unless indeed the latter repealing act was passed during the same session (Code, § 7).

(3) *Repeal of validating statutes.*—The repeal of *validating statutes* by the Code is not to affect the validity of the acts, contracts or transactions validated (Code, § 8).

(4) *Effect of Code.*—The Code went into effect January 13, 1920, and repealed all acts of a general nature, except "as hereinbefore or hereinafter expressed" (Code, § 6567); and Acts 1918 are expressly excepted (Code, § 6568). But such repeal does not affect the bar of any statute of limitation, nor the continuance of persons in office (Code, §§ 6569-71; see also (21), above).

STEAMSHIPS AND STEAMBOATS

See *Common Carrier; Corporations; Death by Wrongful Act, etc.*

§ 1. Creation of steamship and steamboat companies; costs.—They are chartered like other public service corporations (other than railroads), such as telegraph, telephone, canal, or turnpike company, etc.—see *Corporations*, section 4; for costs, see section 5.

§ 2. General laws applicable to such companies.—The general provisions of the Code as to corporations in general (§§ 3776-3848, and Acts 1920, pp. 489, 594, 565, amending §§ 3780, 3846, 3847, respectively); the general provisions of the Code as to public service corporations (§§ 3881-3903, and Acts 1920, pp. 411, 20, amending §§ 3885, 3897, respectively); and the chapter of the Code as to transportation companies generally (§§ 3904-35, and Acts 1920, pp. 234, 618, 20, amending §§ 3905, 3918, 3935, respectively),—apply to steamship and steamboat companies—see *Corporations*, and *Common Carrier*.

§ 3. Taxation of such companies.—See special act as to (Acts 1918, p. 683), and *Taxation and Tax Bill*.

§ 4. Special and miscellaneous laws as to such companies.—There are five sections in the special chapter (157) as to such companies, as follows: §§ 4022-4 (as to separation of white and colored passengers); § 4025 (officers of wharf or landing, and officers of vessels, etc., to be conservators of the peace); and § 4026 (as to suitable accommodations for patrons at wharves).

For miscellaneous sections of the Code and Acts as to such companies, see § 1220 (penalty for allowing food to become contaminated in transit); §§ 3717-19, 3721 (examination, notice, and laws furnished by State Corporation Commission); § 3923 (penalty for captain's failure as to transportation of explosives); § 3957 (guaranteeing bonds of railroad company); §§ 4008-10 (as to certain prohibited excursions); § 4031 (when not liable for goods delivered to express company); § 4575 (loading or unloading cargoes on Sunday prohibited); §§ 4632, 4635, 4637, 4654, as amended by Acts 1918, p. 578, and Acts 1920, pp. 110, 593 (as to delivery of intoxicating liquors); §§ 4632-5, 5638, as amended

by Acts 1918, p. 578, and Acts 1920, p. 110 (as to transportation of intoxicating liquors); Acts 1918, p. 486 (prohibiting the use of public drinking cups).

STRIKES

See Conspiracy

Workmen may lawfully, by agreement amongst themselves, quit work, singly or in a body. They may also communicate their reasons and intent to do so to their employer, but the display of force even though not used, in so far as it may be in the nature of intimidation, is unlawful; likewise is interference in the transfer of merchandise in an attempt to compel employment of none but union men or attempts to prevent others from entering employment, either by threats or overt acts; likewise attempts on the part of strikers to drive others to relinquish employment by calling them "scabs" and "blacklegs," and the exercise of some physical force.

SUBPONEA DUCES TECUM

§ 1. **Nature of the writ.**—This is a writ or process not only to testify but to bring with him and produce to the court a book of accounts, writing, or document. For procedure, see Code, §§ 6219-21, 6237.

§ 2. **Form of application for writ.**—

No. 1. AFFIDAVIT

(Code, § 6237; Pollard's Code Biennial 1920, p. 301.)

Virginia, ——— county, to-wit:

This day personally appeared before me, ———, a notary public in and for the county in the State aforesaid, ———, who made oath before me in my said county that he is the defendant (or plaintiff) in the above-entitled action, pending in the circuit court of the county

of——, Virginia, and that he verily believes that there is in possession of the plaintiff (or defendant) certain books of accounts or other writings containing material evidence for him in said action and said books of accounts or other writings are such as show (here specify with "reasonable certainty such writing or part of such book").

Given under my hand this —— day of ——, 192—.

N. P.

No. 2. DIRECTION TO CLERK.

(*Idem.*)

To the Clerk of the Circuit Court of the County of ——, Virginia:

Issue summons upon the foregoing affidavit as required by section 6237 of the Code of Virginia, and acts amendatory thereof, requiring the defendant (or plaintiff) to produce the writing or an exact copy of such part of the books of account set out in said affidavit filed in your office on the —— day of ——, 192—, and have summons and copy of said affidavit served on the defendant (or *plaintiff*) (or, if the plaintiff be a non-resident, on ——, his attorney).

Given under my hand this —— day of ——, 192—.

P. Q. (or p. d.)

SUITS AND ACTIONS

See *Motions for Money; Removal of Causes; Taxation and Tax Bill*; and particular titles; and notes
to sections cited of Code, 1919

- § 1. In what county or city brought
- § 2. In what courts
- § 3. By and against unincorporated associations or orders
- § 4. Unlawful maintenance of suits
- § 5. Parties
- § 6. The different actions

§ 1. In what county or city brought.—By section 6049 of the Code: "Any action at law or suit in equity, except where it is otherwise especially provided, may be brought in any county or corporation—

(1) Wherein any of the defendants may reside.

(2) If a corporation be a defendant, wherein its principal office is, or wherein its mayor, rector, president, or other chief officer resides. (See *Corporations*, section 11.)

(3) If it be to recover a loss under a policy of insurance, either upon property or life, wherein the property insured was situated at the date of the policy, or the person whose life was insured resided at the date of his death or at the date of the policy.

(4) If it be to recover land, or subject it to a debt, wherein such land or any part thereof may be; or if it be against a foreign corporation, wherein its statutory agent (the Secretary of the Commonwealth—Code, § 3845), resides, or it has any estates or debts owing to it within this State (see *Corporations*, section 10, (4)); or if it be against a defendant who resides without this State, wherein he may be found and served with process, or may have estate or debts due him.

(5) If it be on behalf of the Commonwealth, whether in the name of the Attorney-General or otherwise, it may be in the city of Richmond.

(6) If it be an action or a suit in which it is necessary or proper to make any of the following public officers a party defendant—to-wit, the Governor, Attorney-General, Treasurer, Register of the Land Office, either Auditor, Superintendent of Public Instruction, or Commissioner of Agriculture; or in which it may be necessary or proper to make any of the following public corporations a party defendant—to-wit, the Board of Education or other public corporation composed of officers of government, of the funds and property of which the Commonwealth is sole owner, or in which it shall be attempted to enjoin or otherwise suspend or affect any judgment or decree on behalf of the Commonwealth, or any execution issued on such judgment or decree, it shall be only in the city of Richmond.

(7) If a judge of a circuit court be interested in a case, which but for such interest, would be proper for the jurisdiction of his court, the action or suit may be brought in any county or corporation in an adjoining circuit."

By section 6050: "An action or suit may be brought in any county or city wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein."

§ 2. In what courts.—See Code, §§ 6051-3.

§ 3. By and against unincorporated associations or orders.—By section 6058 of the Code: "All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated. Process against such association or order may be served on any officer or trustee of such association or order."

As to service of process or notice on common carriers not incorporated see Code, § 6067; and *Carriers (Private)*.

§ 4. Unlawful maintenance of suits.—See *Maintenance and Champerty*.

§ 5. Parties.—See 4 Min. Inst. 450-3, 1396-7; Burks' Pl. & Pr. (new ed.), title *Parties*. See, also, *Change of Parties*.

§ 6. The different actions.—See "Burks' Pleading & Practice" (new ed.), titles *Ordinary Actions at Law*, *Actions of Debt*, *Action of Covenant*, *Assumpsit*, *Action of Account*, and *Trespass and Trespass on the Case*.

SUNDAY

See *Common Carrier; Holidays; Weapons (Dangerous)*

- § 1. Working or transacting business on Sunday; how punished
- § 2. Exception as to the Jews
- § 3. What transportation and work by railroads and steamships and steamboats prohibited
- § 4. Carrying dangerous weapons to church—see *Weapons (Dangerous)*
- § 5. Contracting on Sunday
- § 6. Form of "description" in warrant or indictment

§ 1. Working or transacting business on Sunday; how punished.—By section 4570 of the Code: "If a person on a Sunday be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall be deemed guilty of a misdemeanor and upon conviction

thereof shall be fined not less than \$5 for each offense. Every day any person or servant or apprentice is so employed shall constitute a distinct offense and the court in which or the justice by whom any judgment of conviction is rendered may require of the person so convicted a recognizance in a penalty of not less than \$100 or more than \$5,000, with or without security, conditioned that such person shall be of good behavior, and especially to refrain from a repetition of such offense, for a period not exceeding twelve months. This section shall not apply to furnaces, kilns, plants and other business of like kind that may be necessary to be conducted on Sunday."

§ 2. Exception as to the Jews.—By section 4571 of the Code: "The penalty imposed by the preceding section shall not be incurred by any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day, provided he does not compel an apprentice or servant, not of his belief, to do secular work or business on a Sunday, and does not on that day disturb any other person."

§ 3. What transportation and work by railroads and steamships and steamboats, prohibited.—See Code, §§ 4572-5.

§ 4. Carrying dangerous weapons to church.—See *Weapons (Dangerous)*.

§ 5. Contracting on Sunday.—The fact that contracts are made on Sunday will not affect their binding character, unless it be so declared by some statute. One is not bound to work on Sunday in order to perform his contract unless he expressly agreed to do so and can do so without a breach of the law. Except as to judicial acts, which are void when done on Sunday, the common law makes no difference between Sunday and any other day. (Bouvier's Law Dictionary, title *Sunday*.)

§ 6. Form of "description" in warrant or indictment.—

NO. 1. SUMMONS OR WARRANT OF ARREST FOR VIOLATION OF THE SABBATH
(Code, § 4570.)

DESCRIPTION:

"the said day being a Sabbath day, was found laboring at his trade and calling, and did, on the said Sabbath day, labor at his said

trade and calling by [here state what labor or business C. D. was engaged in], which said labor was not household work or other work of necessity or charity."

NO. 2. SUMMONS ON WARRANT OF ARREST FOR RUNNING FREIGHT TRAIN ON SUNDAY

(Code, §§ 4572-4.)

DESCRIPTION:

"then and there controlling and operating a railroad in said county, did then and there, on said day, it being a Sunday, between sunrise and sunset of said day, by itself, agents, and employees, run and transport upon its said road, in said county, a certain train of cars, not then and there used exclusively for the relief of wrecked trains or trains so disabled as to obstruct the main track of the said railroad, nor for the transporting of the United States mail, or of passengers and their baggage, or of live stock, or of articles of such perishable nature as would be necessarily impaired in value by one day's delay in their passage."

SURETIES

- § 1. Suretyship distinguished from guaranty
- § 2. When guarantor or surety is discharged
- § 3. Surety's or guarantor's right of subrogation
- § 4. Surety's remedy by motion for money paid
- § 5. Effect of judgment by confession or default by surety without notice to principal
- § 6. Right of contribution between co-sureties
- § 7. Other statutory provisions as to sureties

§ 1. Suretyship distinguished from guaranty.—A suretyship is a promise to answer for another's debt or default, by which the surety becomes bound, with the principal, usually by the same instrument, at the same time, and for the same consideration, thus becoming an original promisor or debtor along with the principal debtor. The surety obligates to see that the debt is paid; the guarantor, to see that the debtor pays the debt; so the surety is sued as a promisor to pay the debt, while the guarantor is sued specially on his contract (76 Va. 941, 944-5). See *Guaranty*, section 1. The subjects are, however, nearly related, and many of the principles are common to both.

§ 2. **When guarantor or surety is discharged.**—A guarantor or surety is discharged by the omission of the creditor to perform any condition, expressed or implied, imposed upon him by the writing, or by any fraud practiced upon him by the creditor, as by misrepresentation or concealment, with the knowledge or assent of the creditor, of any of the facts likely to affect the extent of the guarantor's or surety's liability. But where the misrepresentation is made by the principal debtor, without the connivance or knowledge of the creditor, the surety is not discharged. As to a bond executed by sureties with the expectation and assurance that it shall not be binding on them unless and until it is executed by another party, who never executes it, if the bond indicates on its face that it is not complete (as, where the names of the intended obligors are inserted in the body of the instrument), it is not binding on those who sign it, although the condition may not have been known to the obligee when it was delivered to him otherwise than through the form of the writing; but otherwise where the bond, when signed, is a complete and perfect instrument on its face.

The surety is also discharged if the creditor, without the surety's consent, discharge the principal, or enter into any agreement with him whereby the surety's situation is altered for the worse, or which would render a proceeding against the surety a fraud upon the principal; as, if he agree to give time to the principal. But mere indulgence, without any binding promise on the creditor's part to preclude him from proceeding at law (as, where there is no valuable consideration), does not discharge him; and even where the creditor has released and discharged the principal, still, if the surety has consented to remain liable, he will continue so accordingly. In the case of sealed instruments, such defenses must be in a court of equity.

The surety or guarantor or endorser is protected against such indulgence by sections 5774-5 of the Code, which provides: "The surety, guarantor, or endorser (or his committee or personal representative), of any person bound by any contract, may, if a right of action has accrued thereon, require the creditor or his committee, or personal representative, by notice in writing, to institute suit thereon, and if he be

bound in a bond with a condition, or for the performance of some collateral undertaking, he shall also specify in such requirement the breach of the condition or undertaking for which he requires suit to be brought. If such creditor, or his committee, or personal representative, shall not, within fifteen days after such requirement, institute suit against every party to such contract, who is resident in this State and not insolvent, and prosecute the same with due diligence to judgment and by execution, he shall forfeit his right to demand of such surety, guarantor or endorser or his estate, and all his co-sureties and their estates, the money due by any such contract for the payment of money, or the damages sustained by any breach of the collateral condition or undertaking specified as aforesaid; but the conditions, rights, and remedies against the principal debtor shall remain unimpaired thereby."

The surety is also discharged in equity if the creditor, with the surety's consent, shall by design or negligence, relinquish or lose any collateral securities to which he may have been entitled by the lien of executions, attachments, or otherwise. But the mere countermanding an execution before levied, although after it has gone into the officer's hands, is not the relinquishment of any lien, and so does not discharge the surety. (3 Min. Inst., 186-9.)

§ 3. Surety's or guarantor's right of subrogation.—

When the surety's or guarantor's obligation to pay becomes absolute, he may apply to equity to be exonerated by his principal. When he has paid his principal's debt or any part of it, he may obtain reimbursement in a court of law. And in equity he may have any fund or subject which was charged with the principal's debt applied for his indemnification. This is the doctrine of subrogation or substitution. Where a surety pays a bond in the principal's life-time, it is forever discharged both at law and in equity; but it is otherwise where the payment, is after his death, because by his death all his debts become a lien on his estate, and the creditor having a lien the surety is allowed a lien also.

The right of subrogation exists where the surety's property only is pledged, as where he is under a personal liability. But the party paying must have been previously held for the

debt, either by a personal obligation or by a charge on his property or rights. The doctrine is never applied to a mere volunteer or stranger paying another's debt.

While a surety has ordinarily no right to file a bill in equity to stay the hand of the creditor and force him to proceed first against the principal, yet in a suit in equity by the creditor against both principal and surety, the court will regard the equities of the parties among themselves and subject the lands of the principal first, if this can be done without materially delaying or otherwise interfering with the rights of the creditors (28 Grat. 825).

In order to entitle one to the right of subrogation, however, he need not be a surety in the ordinary sense. Any one who has an interest in an estate which is subject to a lien may pay off such lien, which will in equity be kept alive for his benefit. This applies to judgment creditors, junior mortgagees, purchasers of equities of redemption, tenants in dower, curtesy, etc.; as, where a married woman who has united with her husband in a mortgage or deed of trust and afterwards pays it off or some part thereof, she is subrogated to the rights of the mortgagee (75 Va. 407).

One who pays the debt for which he is bound as surety is entitled to be subrogated to a judgment or decree against the principal; to have the benefit of the lien thereof upon the principal's land, in preference to subsequent judgment creditors; to have the benefit also of whatever right, if any, such judgment may confer in the distribution of his personal assets; and the privilege of filing a creditors' suit in his own name, to obtain satisfaction out of assets not reachable by execution; and all this, whether the judgment or decree is against the principal and surety jointly or not. Sureties, and those who stand in the relation of sureties for those for whom they pay a debt, are entitled to stand in the place of the creditor, or to be subrogated to all his rights as to any fund, lien, security, or equity which he may have against any other person or property on account of the debt. Thus, if upon the sale of land, a surety for the purchase money pays the debt, he is entitled to be subrogated to the vendor's lien for unpaid purchase money, as against the vendee and purchasers from him without notice; so as to a bond paid by a

surety, which is declared by statute to have, when returned to the clerk's office, the effect of a judgment against the obligors therein; and, where a testator's debts are by his will charged on his lands, and his executor pays those debts out of his own estate.

The same doctrine applies as to mortgages, deeds of trust, and other liens given as security for a debt, both where the surety is a creator of the lien jointly with the principal, and where the security is against the principal's property only, and the surety's obligation is collateral. (4 Min. Inst. 418-23.)

§ 4. Surety's remedy by motion for money paid.—By section 5777 of the Code: "If any person liable as bail, surety, guarantor, or endorser, or any sheriff liable for not taking sufficient bail, or the committee, or heir, or personal representative of any so liable, pay, in whole or in part, any judgment, decree, or execution, rendered or awarded on account of such liability, the person having right of action for the amount so paid, may, by motion (after 10 days' notice—§ 6044) in the court in which the said judgment, decree, or execution was rendered or awarded, obtain judgment or decree against any person against whom such right of action exists for the amount so paid, with interest from the time of payment, and five per cent. damages on said amount."

For form of notice of such motion, see *Motions for Money*, section 6, No. 5.

The Revisors of Code 1919 omitted section 2895 of the Code of 1887, giving a similar remedy by motion against co-sureties. The remedy, therefore, is only in equity.

§ 5. Effect of judgment by confession or default by surety without notice to principal.—See Code, § 5778.

§ 6. Right of contribution between co-sureties.—Contribution is the means by which equality is brought about among co-sureties, by obliging those who have paid nothing, or less than their proper share, to reimburse those who have paid more. The principles and practice are similar to those relating to subrogation, above. It is immaterial that the sureties are bound by different instruments, and without the knowledge of one another, provided they are bound for the same principal and for the same engagement. Where all

solvent, each is liable for his proportionate share which may be had from one's administrator or executor as well as from himself. If one surety is insolvent, his share will at law be lost to him who seeks contribution, but in equity it is apportioned among the solvent sureties; and the departure of a surety from the State is equivalent to insolvency.

At common law a surety cannot compel contribution until he has paid the debt or more than his proper share; nor unless the principal be insolvent, or at least unless it appears that due diligence has been used without success to obtain from him the sum claimed.

Where the obligations of different classes of sureties are wholly for distinct things, and have no relation to, nor operation upon, one another, though they may arise out of the same principal indebtedness, there is no claim from one class upon another, either for contribution or indemnity; and so, where one set of sureties are substituted for another, in the same duty, whereupon the liability of the former set ceases, as in the case of new official bonds given upon the demand of the original sureties (Code, §§ 5771-2); or of indemnity of the sureties in a forthcoming bond, upon granting an injunction (Code, §§ 6324-5).

If one be bound, either personally or in his property, as original surety for a debtor, and upon the creditor's bringing suit against the principal, a third person becomes the latter's surety in a bail-bond, a delivery bond, an appeal bond, an injunction bond, or other like secondary obligation, this latter surety, upon paying the debt, has no recourse whatever against the original surety or his property.

If one set of sureties be bound for a debt, and then the obligee takes another bond as supplemental security, upon which the obligors are to be liable only in case the principal and sureties in the former bond fail to pay, the sureties in the former bond, stand in the relation of principles to the new sureties, who, although not bound with them, are bound for them, and of course have no claim for contribution against the new sureties, and are, on the contrary, bound to them for full indemnity.

For the purpose of giving effect to the doctrine of contribution, any surety who pays the debt is subrogated to all

the rights and remedies of the creditor, against the co-sureties, in precisely the same manner as against the principal debtor, not only as to judgments, decrees, mortgages, and all other collateral securities whatsoever, but also as to the bond or other writing by which the principal and surety are together bound for the debt.

If one of several co-sureties takes subsequently a deed of trust or other security from the principal, for his own indemnity, it enures in equity to the common benefit of all the sureties. (4 Min. Inst., 423-30.)

By section 5779 (inserted by the Revisors of Code 1919), "contribution among wrongdoers may be enforced where the wrong is a mere act of negligence, and involves no moral turpitude."

§ 7. Other statutory provisions as to sureties.—How sureties on official bonds relieved—see Code, § 5771; how, on bonds of State depositaries, and what Treasurer to do as to deposits until new bond is given—§ 5772; officer failing to give new bond removed from office, and depositary discontinued, if new bond not given—§ 5773; how surety on bond given under decree of court for payment of money, may obtain indemnity—§ 5776. See, also, index to the Code, title "Sureties".

SURVEYOR (COUNTY)

§ 1. Appointment, term, qualification, and bond.—The circuit judge in term-time or vacation, upon the recommendation of the board of supervisors, in November, every fourth year after 1919, or whenever a vacancy occurs, appoints a county surveyor, for four years; and he qualifies before the court, judge or clerk, by taking the oaths prescribed by law, and giving bond in a penalty, not less than \$2000. (Code, §§ 126, 2696-8.) A clerk or his deputy cannot hold the office (Code, § 2840).

§ 2. May administer oaths.—This he may do in execution of his duties (Code, §§ 274, 2840).

§ 3. How and when surveys made; books of surveyors, etc.—See Code, §§ 2841-9.

§ 4. Duties as to particular surveys.—See § 480 (links in titles); § 672 (school house site); §§ 1749-50 (drainage districts); §§ 1838-9, 5288 (coal or other mine); §§ 2840-1, 2495 (delinquent lands); § 2977 (city or town); §§ 3163, 3257 (Baylor survey); §§ 3223-6, 3257, 3259 (oyster ground); § 3154 (commissioner of fisheries); § 3230 (bathing ground); § 3295 (clamming or crabbing ground); § 3670 (Elizabeth river); §§ 3857, 3866 (railroads and public service corporations); § 5490 (boundaries of land); §§ 2680, 2685, 2691-3 (counties and magisterial districts); §§ 420, etc. (land office surveys).

§ 5. When surveyor conservator of the peace.—A "county surveyor, while in the performance of the duties of his office within his county", is a conservator of the peace, and may require bond for good behavior, like a justice (Code, §§ 4789, etc.).

§ 6. Fees of a surveyor.—See Code, § 3479. He should keep a fee book (Code, § 3494).

TAXATION AND TAX BILL

See Assessment of Taxes; Delinquent Tax Sale; Erroneous Assessments; License and License Taxes

I. TAXATION IN GENERAL

- § 1. "Tax Bill" of 1903 and amendment act taxing railroad cars, and charters of cities, continued in force
- § 2. Segregation of the subjects of taxation
 - (1) Local taxation
 - (2) State taxation
 - (3) Rolling stock
 - (4) Intangible personal property
 - (5) Additional levy by cities and towns
 - (6) Other provisions
- § 3. State Tax Board and Examiner of Records
- § 4. Local boards of review
- § 5. Collection of taxes
- § 6. Tax on each business engaged in
- § 7. Aggrieved corporation may appeal; penalty for failure to report; duty of State Corporation Commission

- § 8. School taxes to be separately assessed and paid in money
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II. TAX ON PERSONS AND PROPERTY

- § 10. Lands
- § 11. Personal or Capitation tax
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- § 19. Steamboats, etc.
- § 20. Sleeping car, parlor car, and dining car companies
- § 21. Telegraph and telephone corporations
- § 22. Water, heat, light, and power companies
- § 23. Fees on charters
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IV. TAX ON WILLS, ADMINISTRATIONS, DEEDS, CONTRACTS, SUITS, AND SEALS

- § 26. Wills and administrations
- § 27. Deeds and contracts
- § 28. Suits
- § 29. Seals

V. TAX ON INHERITANCES

VI. LICENSES AND LICENSE TAXES

I. TAXATION IN GENERAL

§ 1. "Tax Bill" of 1903 and amendments, act taxing railroad cars, and charters of cities, continued in force.—See Code, §§ 2398-2400.

§ 2. Segregation of the subjects of taxation.—(1) *Local taxation*.—Real estate and all tangible personal property, including tangible personal property of public service corporations (see *Corporations*, section 2), except rolling stock of railways operated by steam, and the capital of merchants, are subjects of local taxation only, except a school tax of 10c per \$100 on said subjects. (Code, § 2205; see 1 Va. L. R. N. S. 64.)

(2) *State taxation*.—Insurance taxes, taxes on licenses of insurance companies, intangible personal property, rolling

stock of railways operated by steam—and all other classes of property not included in (1), above, are subjects of State taxation. (Code, § 2206.)

(3) *Rolling stock*.—The State Corporation Commission assesses the rolling stock of railways operated by steam, 1 3-5 per cent.; and the rolling stock of electric railways are ratably divided, apportioned, and distributed by them, for local taxation, among the several counties, magisterial districts, cities, and towns, and certified to the board of supervisors and councils, etc., of the cities and towns. (Code, §§ 2207-8.)

(4) *Intangible personal property*.—Cities and towns, and boards of supervisors may assess such property (except stocks of banks, etc.—see section 14, below), not over 30 cents per \$100. (Code, § 2209.)

(5) *Additional levy by cities and towns*.—Cities and towns (except as to intangible property—see (4), above) may impose an additional levy of not over 25 cents per \$100. (Code, § 2212.)

(6) *Other provisions*.—Counties and cities and towns are to levy taxes and adopt the same classification as the State—Code, § 2210. Values to be ascertained, and taxes, local and State, to be extended as provided by the general law—Code, § 2211.

§ 3. State Tax Board and Examiner of Records.—See Code, §§ 2213-25; and Acts 1918, p. 445, amending § 2222, Acts 1920, p. 836, amending § 2224, and Acts 1922, amending § 2215.

§ 4. Local boards of review.—See Code, §§ 2226-32, and Acts 1920, p. 836, amending § 2230, and Acts 1922, amending §§ 2228-9, and repealing §§ 2226-7.

§ 5. Collection of taxes.—See Code, §§ 2407-50, and Acts 1920, pp. 118, 349, 18, amending §§ 2421, 2430-1, 2449, respectively, and Acts 1922, amending §§ 2408, 2414, 2431; and Acts 1918, p. 773, as to § 2423, and Acts 1922 (prohibiting suits to restrain the assessment or collection of taxes).

§ 6. Tax on each business engaged in.—See Tax Bill, § 143; and note to section, in Code.

§ 7. Aggrieved corporation may appeal; penalty for failure to report; duty of State Corporation Commission.—See Tax Bill, § 144.

§ 8. School taxes to be separately assessed and paid in money.—See Tax Bill, § 145.

§ 9. Constitutional provisions and annotations.—See Va. Constitution, and annotations thereto in Code 1919, pp. CLXXVI. & seq., and Pollard's Code Biennial 1920, p. 113; and "Tax Bill" and annotations thereto, in Code 1919, pp. 3077 & seq., and Pollard's Code Biennial 1920, pp. 325 & seq.; and annotations to other sections of the Code referred to in sections 1 to 8 above. Also, see Hurst's Annotated Const. 1902; Pocket Code 1920, pp. 952 & seq., and *Taxation* in Hurst's Va. Dig., and other later digests.

II. TAX ON PERSONS AND PROPERTY

§ 10. Lands.—10 cents per \$100 for schools. (Tax Bill, § 2; see Code, §§ 2205, 2245; section 2, (1), above.)

§ 11. Personal or capitation tax.—On male and female over 21, \$1.50, \$1.00 being for schools, and 50 cents paid into county or city treasurer. (Tax Bill, §§ 4 and 5; Acts 1920, p. 588.)

§ 12. Tangible personal property.—10 cents per \$100 for schools. (Tax Bill, §§ 6 and 7; Code, § 2205; section 2, (2), above.)

§ 13. Intangible personal property.—(1) Bonds (not U. S.), notes, other evidences of debt; (2) capital, but if all capital of a corporation is taxed by the State, stock of individual shareholders cannot be taxed for State purposes; (3) principal of personal estate and credits, other than that of (4); (4) all money other than capital in business, and money in court or the hands of fiduciaries; (5) stock, except where all stock is taxed by the State, or where the corporation pays a franchise tax (see section 25, below), and except stock in banks, etc., and insurance companies (see section 14, below); (6) bonds of counties, cities, and towns, and other political sub-divisions.

The tax on classes (1), (3), and (5), is 65 cents per \$100; on class (2), 70 cents. A city may levy a tax on these classes, not over 30 cents; and a district may levy a road tax not over 30 cents. On classes (4), the tax is 20 cents; on class (6), 35 cents. (Tax Bill, § 8, as amended by Acts 1922, and § 9, as amended by Acts 1920, p. 793; see notes to sections in Code and Pollard's Code Biennial.)

§ 14. Income.—The tax is 1 per cent up to \$3,000; over \$3,000, 2 per cent.; and no city, town or county can make any assessment thereon; and this does not apply to receipts from a public service corporation (see *Corporations*, section 2) paying a State franchise tax thereon, nor to an insurance company paying a State license tax on gross premiums, nor to State and national banks, etc., (see section 14, below), nor to religious, educational, benevolent and other corporations and associations not organized or conducted for pecuniary profit. (Tax Bill, § 10, as amended by Acts 1922, and § 11, as amended by Acts 1919, p. 69; see notes to sections in Code and Pollard's Code Biennial.)

III. TAX ON CORPORATIONS

§ 15. Banks, banking associations, trust, and security companies.—See Tax Bill, § 17; § 18, as amended by Acts 1922; § 19, as amended by Acts 1920, p. 487; and §§ 20 to 22; see, also, notes to sections in Code and Pollard's Code Biennial.

§ 16. Insurance companies.—See Tax Bill, §§ 23 to 26; see, also, note to § 23 in Code.

§ 17. Railway and canal corporations.—See Tax Bill, §§ 27, 28; see Code, §§ 2206-8; see, also, notes to sections in Code and Pollard's Code Biennial.

§ 18. Express companies, etc.—For the tax on express companies, refrigerator, oil, stock, fruit, and other car loaning and other car companies, operating upon railroads, except sleeping car, dining car, drawing room car, and palace car companies, see Tax Bill, § 29; § 29½, as amended by Acts 1919, p. 70; see Code, § 2399; and Acts 1916, p. 499.

§ 19. Steamboats, etc.—For the tax on corporations operating steamboats, steamships or other floating property for the transportation of passengers or freight, see Tax Bill, §§ 30, 31.

§ 20. Sleeping car, parlor car, and dining car companies.—See Tax Bill, §§ 32, 33.

§ 21. Telegraph and telephone corporations.—For tax and license tax on, see Tax Bill, §§ 34, 35; § 36, as amended by Acts 1919, p. 69.

§ 22. Water, heat, light, and power companies.—See

Tax Bill, §§ 36¼, 36½; see note to § 28, in Code and Pollard's Code Biennial.

§ 23. Fees on charters.—See *Corporations*, section 5.

§ 24. Fees for registration.—See *Corporations*, section 5, (8).

§ 25. Annual State franchise tax.—See *Corporations*, section 5, (9).

IV. TAX ON WILLS, ADMINISTRATIONS, DEEDS, CONTRACTS, SUITS, AND SEALS

§ 26. Wills and administrations.—On the probate of a will or grant of administration, not exempt by law, \$1, where estate (including real estate where the administrator or executor has any duty as to it, except where situated out of State) is not over \$1,000 in value at the party's death, the tax is \$1; where over \$1,000, 10 cents for \$100 or fraction thereof, for excess. Where the estate is committed to a sheriff, or sergeant, the creditor making the motion pays the tax, and is reimbursed from the first funds collected. (Tax Bill, § 12, as amended by Acts 1922; Code, § 2403.)

§ 27. Deeds and contracts.—See *Recordation or Registry*, section 8; Code, § 2403; see, also, note to § 13 of Tax Bill, in Code.

§ 28. Suits.—(1) On any original suit or action, other than a suggestion or a suit in chancery, and on removal and appeal cases from a justice, or an appeal from the board of supervisors, or on an attachment issued by a justice and returnable to court, if the real amount of the claim is not over \$500, the tax is \$1; if over \$500, 10 cents per \$100 or fraction thereof for the excess; (2) on every appeal, writ of error, supersedeas, to the court of appeals, \$6; (3) on a chancery suit, \$1.50; (4) on a mandamus, \$3. (Tax Bill, §§ 14, 15; see Code, § 2401.)

§ 29. Seals.—The tax on a seal of the State is \$2, a court, or notary, \$1, except where exempt, which includes a tax on a scroll or any impression on paper in place of a seal, or having the force and effect of a seal. The taxable seals of a court or notary are illegal and void, unless the same is superimposed upon an adhesive stamp in such manner as to cancel the stamp. The county treasurer and clerk, and the city treasurer, are provided with them, from whom

they may be obtained, at \$1 each. No tax is charged when a seal is annexed to a paper or document to obtain a pension, revolution claim, money due for military services, or land bounty, or when a seal is annexed by a notary to an affidavit or deposition; in these cases, the officer should certify that it is a case in which by the laws of Virginia no tax is required. But if a seal is required, and the officer fails to use the adhesive stamp, or makes a false certificate that no tax is required, he is punished by a fine of \$20; and making, selling, using, or having in possession a counterfeit or false stamp or die, or knowingly procuring the same to be done, he is punished by penitentiary one to five years. (Tax Bill, § 16; Code, §§ 2401-2; see 11 Va. Law Reg. 776.)

V. TAX ON INHERITANCES

See Tax Bill, § 44, as amended by Acts 1918, p. 416, and Acts 1919, p. 9, and Acts 1922, adding § 44½, and notes to section in Code and Pollard's Code Biennial.

VI. LICENSES AND LICENSE TAXES

See title *Licenses and License Taxes*.

TELEGRAPH AND TELEPHONE COMPANIES

See Corporations and Public Utility Companies

- § 1. Creation of such companies; costs
- § 2. Erection of lines
- § 3. Penalty for failure to transmit message faithfully or promptly, or to deliver or forward it promptly
 - (1) Receipt and transmission
 - (2) Delivering and forwarding
 - (3) Company need not be incorporated
 - (4) Company cannot contract against its own negligence
 - (5) How penalty recovered
 - (6) Special damages; mental anguish; damages not to be barred by regulations of company
- § 4. Special provisions as to telephone companies
- § 5. General and miscellaneous laws as to telegraph and telephone companies

§ 1. **Creation of such companies; costs.**—They are chartered like other public service corporations (other than

railroads)—see *Corporations*, section 4; for costs, see section 5.

§ 2. Erection of lines.—They may erect their lines and occupy roads, streets, alleys, parks, etc., by consent of board of supervisors or town or city council. (Code, §§ 4035-4038.)

The company may contract for right of way, etc.; but if they cannot agree with the owner, they may proceed to have the same condemned. (Code, §§ 4039-41.)

§ 3. Penalty for failure to transmit message faithfully or promptly, or to deliver or forward it promptly; etc.—

(1) *Receipt and transmission.*—By section 4042 of the Code, as amended by Acts 1922: "It shall be the duty of every telegraph company and of every telephone company doing the business of transmitting and receiving messages for compensation in this State to receive dispatches and messages from and for other telephone or telegraph companies or lines doing the business of receiving and transmitting messages for compensation, and from and for any person; and upon the payment of the established charges therefor, if demanded, to transmit the same faithfully and impartially, and as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a dispatch or message faithfully and impartially, and for every failure to transmit or deliver a dispatch or message as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of \$50 to the person sending or wishing to send such dispatch or message, or the person to whom such dispatch is addressed, or such message is to be sent: provided, however, not more than one recovery shall be had on one dispatch or message, and the recovery of one party entitled thereto shall be a bar to the recovery of the other party. But nothing herein shall prevent any such company from giving preference to dispatches or messages on official business from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of its regular order."

This does not apply to interstate messages. (Code, § 4044.)

A telegraphic message between points in the State is a domestic message; but if it is relayed or goes out of the State in its course of transmission as the only practicable or feasible route and as the most expeditious way of sending it, it is an interstate message, yet the burden of proving this is on the company, to prove which it must introduce as a part of its evidence maps and charts of the lines of wires and relay stations adopted. (Code, § 4045.)

The company may make reasonable regulations for the transmission and delivery of telegrams commonly designated as "day letters" or "night letters," and if they are complied with the penalty imposed by section 4042 above is not incurred. (Code, § 4046.)

(2) *Delivering and forwarding.*—By section 4043 of the Code: "It shall be the duty of every telephone company, doing the business of receiving and transmitting messages for compensation, upon the arrival of a dispatch or message at the point to which it is to be transmitted by said company, to deliver it promptly to the person to whom it is addressed, where the regulations of the company require such delivery, or to forward it promptly as directed where the same is to be forwarded.

"It shall be the duty of every telegraph company, upon the arrival of a dispatch or message at the point to which it is to be transmitted, to cause the same to be forwarded by a messenger to the person to whom the same is addressed or his agent, and upon the payment of any charges due on the dispatch or message to deliver it: provided, such person or agent reside within the city or incorporated town in which such station is, or that at such point the regulations of the company require such delivery."

This does not apply to interstate messages. (Code, § 4044.)

(3) *Company need not be incorporated.*—"Every person, firm, association, or company doing business of telegraphing or telephoning telegrams or messages for the public in this State, whether incorporated or not, shall be subject to the provisions of sections 4042-3." (Code, § 4048.)

(4) *Company cannot contract against its own negligence.*—No such company can by contract or otherwise "limit,

evade, or restrict in any manner whatsoever its liability for negligence in sending, receiving or delivering any dispatch or message." (Code, § 4050.)

(5) *How penalty recovered.*—The penalty being a fine exceeding \$20, a justice has no jurisdiction; but the proper remedy is an action or motion, "either in the county or city from which the message was transmitted or accepted for transmission, or in the county or city of delivery or failure of delivery." (Code, §§ 6015, 2543 (as amended by Acts 1920, p. 319); and §§ 6046, 4047; 88 Va. 296.)

(6) *Special damages; mental anguish; damages not to be barred by regulations of company.*—By section 4051 of the Code: "All telegraph companies and telephone companies doing the business of transmitting and receiving messages for compensation in this State shall be liable for special damages occasioned by the negligence of their operators or servants in receiving, copying, transmitting, or delivering dispatches or messages, or for the disclosure of the contents of any private dispatch or message, to any person other than to him to whom it is addressed, or his agent, the amount of which damages shall be determined by the jury upon the facts in each case. Grief and mental anguish occasioned to the plaintiff by the aforesaid negligence may be considered by the jury in the determination of the quantum of damages. Special damages recoverable under this section shall not be barred by regulations of the company concerning the repeating of dispatches or messages, or by any special undertaking to relieve the company from the consequences of its own negligence."

An action for mental anguish alone cannot be brought under section 5785 (allowing damages for violation of any statute), as that section did not intend to create a new cause of action,—but under that section or under sections 4042-3, damages and penalty may be recovered. (100 Va. 51.)

§ 4. Special provisions as to telephone companies.—Telephone companies are under the supervision and control of the State Corporation Commission, who make rules for the government of the service, requires connection between companies, and inspects line and buildings; agreements between such companies are to be submitted to the commission;

rates established by cities and towns are to be subject to revision by the Commission, and rates fixed by the Commission are not to be questioned in the courts; but the schedules, rules, regulations, and requirements are *prima facie* evidence of the facts therein; and for failure to furnish a report required, or for obstructing the Commission in the discharge of its duty, or for other failure of duty, they are punished by a fine not over \$500. (Code, §§ 4052-7.)

§ 5. General and miscellaneous laws as to telegraph and telephone companies.—The general provisions of the Code as to corporations in general (§§ 3776-3848, and Acts 1920, pp. 489, 494, 565, amending §§ 3780, 3846, 3847, respectively); and the general provisions of the Code as to public service corporations (§§ 3881-3903, and Acts 1920, pp. 411, 20, amending §§ 3885, 3897, respectively),—apply to telegraph and telephone companies—see *Corporations*.

For miscellaneous sections of the Code as to such companies, see *Minors, etc.*, (as to working children as messengers); § 3867 (extension of line in other states); § 4447 (unlawful use of, or injury to, telephone or telegraph lines); § 3945 (duty of operator or dispatcher in railroad office); § 5985 (telegraph operators exempt from jury service); § 3943 (allowing railroad company to construct and maintain telegraph and telephone lines); § 4569 (cursing or using abusive or indecent language over telephone—see, also, *Abusive Language*); § 4011 (requiring railroad office in city or town to be connected with telephone lines); § 4449 and Acts 1918, p. 485 (selling second-hand articles belonging to, punished); and Acts 1918, p. 534 (requiring clerk of court to keep telephone in his office at expense of county or city). For taxation of telegraph and telephone companies, see *Taxation and Tax Bill*.

For where suits brought, on whom and how process or notice served, and acknowledgments, see *Corporations*, sections 11, 12, and 14.

TENDER

- § 1. Definition
- § 2. What is a valid tender of money
- § 3. What money is a valid legal tender

§ 1. **Definition.**—Tender is an offer or attempt to perform, and may be either: (1) An offer to do something promised, in which case the offer, and its refusal by the promisee discharge the promisor from the contract; or (2) an offer to pay something promised, in which case the offer and its refusal by the promisee do not discharge the debt but stops the running of interest and entitles the promisor to recover the costs of his defense. (Clark on Contracts (2nd ed.) 440.)

§ 2. **What is a valid tender of money.**—The tender should be made at the time and place stipulated, in money, of the correct amount (or change from which the correct amount may be taken), unconditional, and the tender should be kept good (with that or other money) and the amount brought into court with the plea. If no time is fixed, it should be within a reasonable time, and if no place is designated, the debtor must seek the debtor, if within the State. The tender should be in current money—not checks, certificates of deposits or other evidences of debt; but this may be waived, and will be so deemed if refused on other grounds. (Burks' Pl. & Pr., § 213.)

This common law doctrine, while not repealed, is practically superseded by the statute as to payment of money into court or to the clerk—see *Payments*.

§ 3. **What money is a valid legal tender.**—Gold coin, silver dollars, other silver coins up to \$10, and nickels, cents, etc., up to 25 cents, U. S. notes (greenbacks), treasury notes of 1890, and national bank notes only to national banks, are a legal tender; the following are not: Gold or silver or currency certificates. (Benj. on Sales, § 705.)

TOBACCO

§ 1. **Inspector or sampler issuing false receipt or note.**—Punishment, penitentiary 2 to 5 years. (Code, § 4708.)

§ 2. **Other matters.**—See *Agriculture*, and *Licenses and License Taxes*.

TORTS

See *Adultery; Agents and Agency; Animals, Fowls, etc.; Assault and Battery; Bailments; Cheats, False Pretences, Deceits, and Other Frauds; Cities and Towns; Carrier (Private); Common Carrier; Death by Wrongful Act; Detinue; Employer and Employee; Fraud; Habeas Corpus; License (on Lands); Libel; Malicious Prosecution; Marriage; Maiming or Mayhem; Minors, Infants, or Children; Nuisance; Railroads and Railroad Companies; Real Estate; Recaption of Property or Persons; Seduction; Slander; Trespass; Trover and Conversion*.

- § 1. Tort defined and explained
- § 2. Torts distinguished from breaches of contract and crimes
- § 3. Damages for violation of a statute
- § 4. Joint wrongdoers
- § 5. Torts may be intentional, negligent, or accidental
- § 6. Negligence as causing torts
 - (1) Requisites
 - (2) Ordinary care required
 - (3) Remote and proximate consequences
 - (4) Concurrent act of third person
 - (5) Contributory negligence of plaintiff
 - (6) Duty toward trespassers or licensees
 - (7) Duty toward business visitors; one not on business
- § 7. Liability for accident

§ 1. **Tort defined and explained.**—Tort, from a French word meaning “wrong,” is any civil injury or wrong, whether by act or omission, other than those which arise out of a breach of contract. The injury may be to real or personal property, or to one’s person or reputation. It may be direct or indirect, by act or commission, or by omission. These injuries cover a large field in the law, many of which are specifically treated in the several cross-references above.

So a tort embraces all injuries or wrongs except crimes (which are not also civil injuries) and injuries from breach of contracts.

§ 2. Torts distinguished from breaches of contract and crimes.—Crimes are wrongs peculiarly mischievous to the public, and public policy demands that they should be punished by the State; other harmful acts are civil injuries and are deemed sufficiently redressed by private suit for damages. Crimes may be and generally are injurious to individuals, as, in case of assault and battery, maiming or wounding, seduction, larceny, embezzlement, etc., and then are also civil injuries.

Whether an act is a tort or arises out of contract depends whether the prevailing or dominant character of the injury is tort; or, in other words, whether the liability can be made out without taking any notice of the contract; on the other hand, if the prevailing character of the injury arise from the contract it is a breach of contract, and not a tort. (See 1 Min. Inst. 527-8; H's G. & M., p. 76.)

§ 3. Damages for violation of a statute.—By section 5785 of the Code: "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages. And the damages so sustained, together with any penalty or forfeiture imposed for the violation of the statute, may be recovered in a single action of trespass on the case upon proper counts when the same person is entitled to both damages and penalty: but nothing herein contained shall affect the existing statutes of limitation applicable to the foregoing causes of action respectively."

The purpose of this section was merely to preserve to the person injured the right to maintain his action for the injury sustained by reason of the wrongdoing of another, and to prevent the wrongdoer from setting up the defense that he had paid the penalty of his wrongdoing under a penal statute. It was not intended to create a new ground for bringing an action for damages. (100 Va. 51; 102 Va. 914.)

Where even a penalty is imposed by statute, actual dam-

ages though in excess of the penalty may be recovered. (77 Va. 173; 84 Va. 553; 86 Va. 19.)

The statutory remedy, however, should be followed. (Graves' Notes on Torts.)

§ 4. Joint wrongdoers.—When the negligence of two or more persons produce a single individual injury, they are joint tortfeasors (or wrongdoers), though they act independently of one another, without any concert of action or privity of purpose; though an exception is made in case of a nuisance (Walton, 63 S. E. 458; Pulaski, etc., 66 S. E. 73).

They may be sued separately or jointly, and not only one or all but any intermediate number may be sued (108 Va. 810).

Where all are sued together there can be no apportionment by the jury of the damages. They can acquit some, and find a verdict against the others, but such verdict (if against more than one) should be a joint verdict against all. As to the execution on such joint judgment, the plaintiff may levy on the goods of any one and make the whole out of his property, though he be least guilty, and in case of intentional torts (see section 5, below), there is no contribution between them. Walton, 63 S. E. 458.)

Where the judgment is against one, a new section (6264), inserted by the Revisors of the Code 1919, changing the Virginia doctrine (95 Va. 456), provides: "A judgment against one of several joint wrongdoers shall not bar the prosecution of an action against any or all the others, but the injured party may bring separate actions against the wrongdoers and proceed to judgment in each, or, if sued jointly, he may proceed to judgment against them successively until judgment has been rendered against, or the cause has been otherwise disposed of as to, all of the defendants, and no bar shall arise as to any of them by reason of a judgment against another, or others, until the judgment has been satisfied. If there be separate judgments against different defendants for a joint wrong, the plaintiff shall elect which of them he will prosecute, but the payment or satisfaction of any one of such judgments shall be a discharge of all, except as to the costs."

As to effect of discharge of one of several joint wrong-

doers, the discharge of one, either with or in the absence of any reservation of the injured person's right as against the rest, operates as a discharge of the rest, whether the discharge of the one is by release under seal, or by accord and satisfaction, i. e., by other agreement and compromise (2 Hen. & Munf. 38). (Graves' Notes on Torts.)

§ 5. Torts may be intentional, negligent, or accidental.

—Thus, a person may drive over another intentionally, negligently, or accidentally; and so with other torts. Intent is the state of mind, negligence is a kind of behavior, while accident, as used in a legal sense, is the negative of intent and negligence. Accident is generally a defense unless the party is engaged at the time in an unlawful or extra-hazardous act. If one intending to injure one person accidentally injure another, he is liable, the intent being transferred from the one to the other. (2 Am. Law & Prac., §§ 7, 157.)

§ 6. Negligence as causing torts.—

(1) *Requisites.*—To constitute such a tort there must be a legal duty to use care; failure to perform that duty; and damage caused by such default. Where the duty is imposed by statute, it must be shown that the duty was owed to the plaintiff; it is sufficient that the duty is owed to a class of persons of whom the plaintiff is one. As to common law duties, it seems the duty cannot be transferred from one to another, as an intent may be (see section 5, above), but it must be owed to the plaintiff. (2 Am. Law & Prac., §§ 155-60.)

(2) *Ordinary care required.*—The standard of care required by the law of torts is ordinary care, i. e., that degree of care which would be exercised by a man of prudence under the circumstances. Whether the care should be great or small, or any at all, depends upon circumstances. Knowledge of the unlawful acts of others at the time, imposes a greater degree of care. There may be in fact, but there are not in law degrees of care or negligence, in case of torts, as there may be in contracts. (2 Am. Law & Prac., §§ 161-5.)

(3) *Remote and proximate consequences.*—The wrongdoer is not liable for consequences—those far removed in the chain of causes; but only for the natural and proximate (near) consequences of his act. Remoteness, however, does not de-

pend upon the elements of time or distance, but is governed by the efficiency of the act in causing a succession of events. A defendant is laible for immediate consequences though improbable. That the injury would not have happened "but for" the defendant's act, is not a proper test of liability. The intervention of the ordinary forces of nature between the act and the damage does not usually break the casual connection. (2 Am. Law & Prac., §§ 171-9.)

(4) *Concurrent act of third person.*—The fact that the act of a third person concurs with that of the defendant does not in any way excuse the defendart. If the third person acts negligently or intentionally, he also may be liable, as both are where active force is used by both. The defendant is liable if a dangerous passive condition created by him concurs with active force by a third person; but if in such case, the third person comes into control of the situation and causes the damage, it is a case of successive rather than concurrent action, and the defendant is liable if his act caused the other's act and the latter's act should have been foreseen by him; and if the intervening actor is also a wrongdoer, he too is liable. (2 Am. Law & Prac., §§ 182-8.)

(5) *Contributory negligence of plaintiff.*—Unless otherwise provided in the treatment of other subjects (see *Agents and Agency, Architects and Builders, Common Carrier, Death by Wrongful Act, Employer and Employee, Hotels, Railroads*) the rule as to contributory negligence is, even though the defendant was negligent and his negligence was a part of the legal cause of the damage, yet if the plaintiff did not use ordinary care for the safety of himself or his property and such negligence was also a part of the legal cause of the damage, he is not entitled to recover. As to contributory negligence of children, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances. Contributory negligence is no defense to intentional torts (see section 5, above). It is a defense to injuries by animals—see *Animals, Fowls, etc.* (2 Am. Law & Proc., §§ 191-200.)

For doctrine of "fellow-servant," see *Death by Wrongful Act.*

Where a defendant intends to rely upon contributory negligence, section 6092 of the Code provides: "If the defendant in any action of tort intends to rely upon the contributory negligence of the plaintiff as a defense to the action, he shall so state in writing before the trial begins, giving the particulars thereof as fully as the plaintiff is required to state the negligence of the defendant in his declaration or bill of particulars; but the defendant shall not be precluded from relying upon the contributory negligence disclosed to the defendant by the plaintiff's testimony."

(6) *Duty toward trespassers or licensees.*—The general rule is that the occupier of land or a building is under no duty to a trespasser or a licensee (i. e., one on the premises by permission) to keep the premises in repair or to warn of any peril, unless in the case of small children; but he is duty-bound to warn a licensee of perils or dangers on the premises, and perhaps to use care to find out danger, provided, (1) the land occupier knows of them; (2) the licensee does not know of them; and (3) the ignorance of the licensee is known or should be known to the occupier. (2 Am. Law & Proc. §§ 219-25.)

(7) *Duty toward business visitor; one not on business.*—The occupier of land or a building is bound to warn not only of known perils but of those of which he ought to know—i. e., he should use care to discover hidden dangers. And the same rule perhaps applies to one invited, though not on business. (2 Am. Law & Proc., §§ 226-9.)

(7) *Liability for accident.*—"Accident" or "inevitable accident," as it is sometimes called, means, as here used, a non-negligent occurrence.

One is liable for an accident caused by him while engaged in an unlawful act; or for an accidental injury to goods wrongfully in his possession. As to fires, to hold one liable, negligence must be proved on him. As to fires set out by railroads, see *Railroads and Railroad Companies*. (2 Am. Law & Proc., §§ 233-4.)

TRADE-MARKS

See Brands; Copyrights; Labels or Prints; Patents

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- § 10. How trade-mark is registered in Patent Office
- § 11. The costs of registering trade-marks
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The law of trade-marks has three sources, the common law, statute in Virginia, and Act of Congress.

I. THE COMMON LAW

§ 1. Definition, origin, and nature of trade-marks.— A "trade-mark" is of common law origin, and is a sign, symbol, letter or letters, word or words, figures, drawings, or device attached to goods, and adopted by the manufacturer or seller thereof, to distinguish his production from others of the same article. Its purpose is to indicate, not quality, but the origin and ownership of the article to which it is attached. It may consist of any design, etc., not previously appropriated by another and not barred from use as a trade-mark by some rule of law. Thus, a miller may mark his flour

with the figure of an eagle or the name of his mill, and these marks will after a time be recognized as indicating that the flour so marked is made by him or at his mill. But he cannot appropriate to his exclusive use such words as "snow white," "superfine," "family flour," or any other descriptive term, since any one else has the right to use such terms to describe his flour.

The common law right to a trade-mark is acquired by being the first to use it—a single use, with evidence of an intent to continue its use is sufficient.

The Trade-Mark Act of Congress (see section 6, below) does not confer on one the exclusive right to a trade-mark, but merely provides for the registration of a trade-mark by one who has the exclusive right to it; and that such registration shall be *prima facie* evidence of his right. As a trade-mark has no necessary relation to invention or discovery, as between two rival claimants it is the party who first actually uses a mark, and not the one who first thought of it or designed it, who is entitled to protection in its use as a trade-mark; and a mere declaration of intention to use a mark in the future does not create a right to its exclusive use as a trade-mark. As to what is or is not a trade-mark, the law is substantially the same under the Act of Congress, as at common law—see section 8, below (4 Am. Law & Proc., pp. 184-7; Parson's Business Laws, pp. 689-90.)

§ 2. Trade-mark distinguished from "good will" and "trade name."—Unfair trade competition may be where one has represented to the public, expressly or impliedly, that the goods sold by him are the goods of another who has won a reputation and good will in that line of business, the law making him pay damages for the fraud and wrong against his competitor. The wrong, though not including the use of a technical trade-mark, may arise out of the use of words or devices which have acquired a peculiar significance in connection with his business, and the plaintiff must show this and that the defendant has fraudulently used the same or like words for the purpose of unfairly taking advantage of the plaintiff's reputation and public good will. In the case of trade-marks, the gist of the action is that the defendant is using on his goods a mark which belongs to the plaintiff,

which the latter must show. Trade names refer to the particular business, or place of business, or class of goods. (4 Am. Law & Proc., pp. 184-5.)

II. STATUTES IN VIRGINIA

§ 3. Trade-marks protected by statute.—It should be observed that trade-marks registered under the Act of Congress applies only to interstate, etc., use of the trade-marks, and does not apply to business entirely within the State—see section 6, below.

Therefore, not content with the common law protection as to trade-marks within the State, we have had since 1904 a statute on the subject. The "labels" are those used as trade-marks. By sections 1455-56 of the Code, when any person, firm, corporation, or union of workingmen adopts or uses any label, trade-mark, term, design, device, or form of advertisement for designating, making known, or distinguishing any goods, wares, merchandise, or other product of labor, as having been made, manufactured, produced, prepared, packed, or put on sale by them, and has filed the same for registry as provided by the act, any one else is forbidden to counterfeit, imitate, use, or sell the same, etc., under a penalty of a fine not over \$100, or imprisonment not over 3 months.

§ 4. How such trade-marks registered; infringement.—Write the Secretary of the Commonwealth, Richmond, Va., for forms of application for registry of labels and trade-marks. Fill it out according to the form, and enclose it, with a copy, facsimile, or counterpart of the label or trade-mark, accompanied by at least \$5 (\$2.50 for registry and \$2.50 for a certificate thereof; if other certificates desired, enclose \$2.50 for each additional one). The Secretary will not record any label or trade-mark that would probably be mistaken for that of another claimant. (Code, §§ 1457-8.)

Fraudulent representations in procuring the filing and registry of trade-marks, is punishable in addition to damages by a fine not over \$100, or imprisonment not over 3 months. (Code, § 1459.)

Infringement of one's trade-mark rights may be stopped by injunction, and the offender made to pay to the plaintiff all profits he has made, and the court orders that all counter-

feit or imitation trade-marks in the defendant's possession to be delivered to an officer or to the plaintiff to be destroyed. (Code, § 1460.)

The suit by a union, not incorporated, may be brought by an officer or member on behalf of and for the use of the union. (Code, § 1462.)

§ 5. Unlawful use of trade-marks, or name or seal, without authority.—Displaying or using a trade-mark, in any manner, without authority, is punished by jail not over 3 months or fine not over \$100. And using the name or seal of any person, firm, corporation, or union of workmen, in or about the sale of goods, or otherwise, without authority, is punishable by the same penalty. (Code, § 1463.)

§ 6. Timber brands.—Persons engaged in lumbering or rafting on Elizabeth river, the Albemarle and Chesapeake canal, Dismal Swamp canal, Chesapeake Bay, or their tributaries, may adopt a mark of designation for their timber, etc., intended to be floated in said waters, by signing a certificate and filing it with the clerk of the circuit or corporation court and paying a fee of 75 cents, and their rights in the premises are protected. (Code, §§ 1444-7.)

And any dealer in logs or timber to be floated on any stream in this State may likewise adopt a brand or trade-mark by executing acknowledging, and recording a writing substantially as follows, giving ample protection to the rights of such timber dealer:

"Notice is hereby given that I (or *we* or *the undersigned company*, as the case may be) have (or *has*) adopted the following brand or trade-mark to be used in my (or *our* or *its*) business as a timber dealer (or *dealers*, as the case may be), to-wit: (Here insert the word, letter or letters, or figures, or device or devices adopted.) Given under my (or *our* or *its*) hand and seal, this — day of —, 192—.

T. D. (Seal.)"

(Code, §§ 1448-54.)

III. ACT OF CONGRESS

§ 7. The act of Congress for registry of trade-marks.—The present Trade-Mark Act of Congress of 1905, as amended, is passed under the Commerce Clause of the United States

Constitution (art. I., § 8, cl. 3), and provides for the registry in the Patent Office of trade-marks used in commerce among the several states, or with the Indian tribes, or with foreign nations, and confers upon the circuit and territorial courts of the United States, and the supreme court of the District of Columbia, original jurisdiction in civil actions at law for damages and actions in equity for injunction and damages, against anyone wrongfully using any such registered trade-mark in such interstate, etc., commerce. (U. S. Rev. Stat., §§ 4937-47, as amended.)

A pamphlet containing the Trade-Mark Act of 1905, revised to date, may be had by writing the Commissioner of Patents, Washington, D. C.

Trade-marks used entirely within the State are not affected by the Act of Congress, but are controlled by the State law—see sections 1 and 3, above.

§ 8. Who may register trade-marks.—Any owner of a trade-mark, who is domiciled or has a manufacturing establishment in the United States, or resides or is located in any foreign country which affords similar privileges to us, may register his trade-mark in the Patent Office.

§ 9. What trade-marks may be registered.—

(1) *Any trade-mark, with 8 exceptions.*—Any trade-mark used in interstate, etc., commerce, by which one's goods may be distinguished from other goods of the same class, may be registered, unless such trade-mark:

(a) Consists of or comprises immoral or scandalous matter; or

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State, or municipality, or of any foreign nation, or of any design or picture that has been, or may hereafter be, adopted by any fraternal society as its emblem; or

(c) Is identical with a registered or known trade-mark owned and used by another, and appropriated to merchandise of the same descriptive properties; or

(d) So nearly resembles such a trade-mark of another as likely to cause confusion or mistake in the mind of the public, or to deceive purchasers; or

(e) Consists merely in the name of an individual, firm, corporation, or association, not written, printed, or impressed, or woven in some particular or distinctive manner or in association with the portrait of the individual (see *Labels or Prints*); or

(f) Consists merely in words or devices descriptive of the goods with which used, or of the character or quality of such goods (see *Labels or Prints*); or

(g) Is merely a geographical name or term; or

(h) Is the portrait of a living individual (except by his consent in writing); or

A trade-mark in actual and exclusive use as such for 10 years before the date of the Act (Feb. 20, 1905).

(2) *What trade-marks are too similar, under (d), above.*—The following are held too similar (under (d) above) for registration of both: "Oleveine" and "Olevant"; "Optal" and "Optine"; "Liveraid" or "Liverine," and "Liveroid"; "Camille Royal Combination" and "La Camille"; "Old Jay" and "Blue Jay"; "Club Cocktails" and "Chancellor Club"; "Kroupole," "Croupine," or "Croupeline," and "Croupaline," But the following are not too similar: "Sozodont" and "Zodenta"; "Mayfield" and "Mayfair"; "Cuticura" and "Cuticle".

(3) *What trade-marks are merely descriptive, under (f), above.*—A mark merely descriptive of the qualities, ingredients, or characteristics of the article, is not a valid trade-mark at common law, and cannot be registered in the Patent Office; otherwise, the English language would soon be monopolized, leaving no room for others to describe their goods.

The following words are held descriptive and cannot be registered as trade-marks: "Air-cell," for fire-proofing material; "Apple and Honey," for a medicine; "Best," for flour; "Cantripum," for clothes; "Klean-well," for massage sponges; "Neverstick," for lubricants; "Vogue," for boots and shoes; "Sterling," for ale; "Standard," for machines. But "Magnetic-Balm," for a medicinal compound, and "Electro-silicon," for a polishing compound, is a good trade-mark.

The following symbols are not proper trade-marks: A picture of a bag with the open end closed by a tie, as a mark for bags; and the picture of a corn plaster, as a trade-mark for corn plasters.

A mark originally arbitrary may become descriptive by long use, as, "Albany Beef", for canned sturgeon, and "New Manny", for harvesting machines; and so cannot be made a trade-mark.

Neither can descriptive words in foreign languages be used as trade-marks.

It generally makes no difference whether the word is correctly or falsely descriptive; but a word not descriptive of that article but of something else, as, "Naphthol Methane", for carbon black, is a valid trade-mark, because it is well-known such substance does not contain the chemicals indicated in the name.

A name given a new article, as, "Leclanche", for a certain kind of battery, becomes descriptive and public property.

The true test of descriptive words is whether the public will on the whole regard the word as an arbitrary symbol denoting only the origin and ownership of the goods, or as an advertisement of some desirable quality of the goods, reasonably indicative and descriptive of the thing intended.

(4) *What trade-marks are geographical, under (g), above.*—The following are not valid trade-marks; "York", for stoves and ranges; "Clinton", for wagons; "Elgin", for watches, as to manufacturers in the same locality; and "Grecian", "French", "German", "English", and the like. But a nickname, as "Hoozier", for machinery, or "Yankee", for soap, is a valid trade-mark. (4 Am. Law & Prac., pp. 189-94.)

§ 10. How trade-mark is registered in Patent Office.—First write the Commissioner of Patents, Washington, D. C., to send you the necessary blanks (with a copy of the law and instructions) for application to register a trade-mark. Fill out the application and the sworn declaration of facts, and send them, with a drawing of the trade-mark, 5 specimens or facsimiles of the trade-mark as actually used upon the goods, and a fee of \$10. On filing the application, the commissioner causes an examination to be made, and if it appears that the applicant is entitled to a registration, the trade-mark is published in the "Official Gazette", of the Patent Office. Thereupon, any one may within 30 days,

file a notice in opposition duly verified, stating the grounds for such opposition. In all such cases, and in cases where an application interferes with a pending application in the Patent Office or with a certificate of registration previously issued to another (as where one applies to have a registration canceled), an "interference proceeding" similar to those in patent cases is conducted, and it is thereby determined which party is entitled to registration. If no notice of opposition is filed within the 30 days, or if the "interference" is decided in favor of the applicant, a certificate of registration is issued in due course, which is good for 20 years and may be renewed from time to time for like periods upon payment of \$10 in each case.

An appeal lies from the adverse decision of the examiner to the Commissioner in person; and from his adverse decision, to the Court of Appeals of the District of Columbia.

§ 11. The costs of registering trade-marks.—The principal fees connected with such registration are as follows:

On filing each original application for registration...	\$10.00
On filing each application for renewal of registration..	10.00
On filing notice of opposition to registration	10.00
On appeal from the examiner in charge to the Commissioner of Patents	15.00
For recording every assignment, agreement, power of attorney, or other paper, of 300 words or less....	1.00
Do., of more than 300 words and less than 1,000 words..	2.00

If too much money is sent, the excess will be refunded.

§ 12.—How registry of trade-mark indicated.—To give public, the registry of a trade-mark must be indicated thereon, as follows: "Registered in U. S. Patent Office", or Reg. U. S. Pat. Off."

§ 13. Infringement.—Any person, without the consent of the owner, uses in such interstate, etc., commerce, a reproduction, counterfeit, copy, or colorable imitation of registered trade-mark, upon merchandise of substantially the same descriptive properties, is guilty of infringement. If the use is only within a state, the state law controls—see sections 1 and 3, above.

The remedies are by action at law for damages, or by

suit in equity for injunction and damages. In an action at law, or in the suit in equity, the court may enter judgment for any sum above the amount found by the verdict as the actual damages, according to circumstances, not exceeding three times the amount of the verdict, together with the costs. In assessing profits, the plaintiff is required to prove the defendant's sales only; the defendant must prove all elements of cost claimed. The court may also order the destruction of all labels, signs, prints, packages, wrappers, receptacles, or any reproduction, counterfeit, copy, or colorable imitation of it, in the defendant's possession, bearing the plaintiff's trade-mark.

§ 14. Importation of trade-marks.—Imported goods bearing foreign trade-marks injuriously imitating United States trade-marks shall be refused entry at all United States custom-houses; and to prevent their entry, each owner of a trade-mark should lodge with the Commissioner of Patents a copy and description of it, copies of which will be forwarded to each collector or other proper officer of customs.

§ 15. Assignment of trade-marks.—Trade-marks may be sold and assigned like the good-will of a business, but the sale or assignment must be made by instrument in writing duly acknowledged according to the laws of the country or State in which the same is executed. The assignment must be recorded within three months from the date.

TREASON

For treason and misprison of treason (i. e., omission to inform the authorities of treason), and other offenses against the sovereignty of the State, see Code, §§ 4389-92.

TREASURERS (COUNTY AND CITY)

See Code, §§ 2774-93, and Acts 1922, amending §§ 2775, 2780. For act requiring them to account for interest received upon funds of the State, or any city, county, or other political subdivision thereof, see Acts 1922, p.—.

TREASURY, AUDITORS, AND TREASURER

For manner of receiving and disbursing at the treasury, and duties of the auditors and treasurer, see Code, §§ 2155-2204, and Acts 1922, amending § 2158.

TRESPASS

I. CRIMINAL CASES

- § 1. Hunting on another's land
- § 2. Unlawful or malicious injury to property
 - (1) General statute
 - (2) Special statutes
 - (a) Fences and gates
 - (b) Public buildings, etc.
 - (c) Vessel or other water craft
 - (d) Killing or injuring, horse, cattle, or other beast, dog, or fowl
 - (e) Canal, railroad, electric railway, or power company, bridge, fixture, etc.
 - (f) Trespasses against railroads
 - (g) Telephone and lines
 - (h) Light and power companies
 - (i) Cemeteries, burial grounds, etc.

II. CIVIL CASES

- § 3. In general
- § 4. Injuries and trespasses by animals
- § 5. Injuries to animals
- § 6. Form of "description" in warrant or indictment

This subject will be presented under the following heads:
I. Criminal Cases; II. Civil Cases.

I. CRIMINAL CASES

§ 1. Unlawful hunting, trespassing, etc., on another's lands.—"All owners and landlord's and members of their families, or renters, residing thereon, with the consent of the landowners, may hunt upon their own or adjoining lands without a license" (Code, § 334).

Hunting outside the limits of one's own or the adjoining

property, without a license, is punishable by a fine of \$5 to \$25 (Code, § 3337). By section 3338 of the Code, as amended by Acts 1922: "If any person without the consent of the owner or the consent of a tenant who has been granted in writing specified exclusive hunting privileges on said land by a landlord, shoot, hunt, range, fish, trap, or fowl on or in the lands, waters, mill ponds, or private ponds of another, other than uninclosed mountain lands west of the Blue Ridge mountains not used for cultivation, he shall be deemed guilty of a trespass, and upon conviction thereof shall be fined not more than \$50 (the above shall not apply to *bona fide* fox and deer hunters), and in addition thereto shall be liable to an action for damages; and if any person, after being warned not to do so by the owner or tenant of any premises, shall go upon the lands of the said owner or tenant, he shall, in addition to the liabilities imposed under this section, be deemed guilty of a misdemeanor, and upon conviction thereof, punished by a fine not exceeding fifty dollars or imprisoned in the county jail not exceeding sixty days, or both, in the discretion of the justice or jury trying the case."

Upon conviction a third time, the justice shall require the offender to give a recognizance, with sufficient surety, for his good behavior for a year, and if he fail to do so commit him to jail for one month, unless he sooner give it (Code, § 3362).

For the law (which must first be adopted by the board of supervisors) as to trapping, etc., for fur-or-hair-bearing animals on another's land, see Code, §§ 3348-55.

§ 2. Unlawful or malicious injury to property.—(1) *General statute.*—By section 4479 of the Code: "If any person, unlawfully, but not feloniously, take and carry away, or destroy, deface, or injure any property, real or personal, not his own, or break down, destroy, deface, injure or remove any monument erected for the purpose of marking the site of any engagement fought during the War between the States, or for the purpose of designating the boundaries of any city, town, tract of land, or any tree marked for that purpose, he shall be fined not less than \$5 nor more than \$500."

At common law a trespass is only a civil injury, unless the injury be committed with special malice to the owner,

or involves a breach of the peace. Under the statute, the act need only be unlawful, and not felonious nor under a *bona fide* claim of right, and may relate to any property, real or personal, including living domestic animals—other than dogs, cats, and animals kept for curiosity or whim—even though they be on the defendant's land. (H's G. & M. p. 373.)

(2) *Special statutes.*—(a) *Fences and gates.*—Pulling down fences or leaving open gates of another, or leaving open a gate at any public or private railroad crossing is fineable \$5 to \$20, to be recovered before a justice (Code, § 4481).

(b) *Public buildings, etc.*—Wilfully and maliciously to injure such property, statuary, or furniture, is fineable not over \$300, or jail not over 60 days, or both (Code, § 4482).

To constitute an offense under this section the act must be done "wilfully and maliciously." The word "wilfully," in law, as in common speech, means purposely, intending the result which ensues. But while "maliciously," in common acceptation, means with ill-will against a person, in its legal sense its meaning is closely allied to that of wilfully, signifying the wilful doing of a wrongful act without just cause or excuse. A malicious trespass, therefore, under the foregoing section, as under this chapter generally, means nothing more than a trespass committed intentionally without just cause or excuse. (H's G. & M., p. 375.)

Inquiries to trees, fences, or herbage on the grounds of the Capitol, or in any public square, is fineable not over \$300 (Code, § 4483).

(c) *Vessel or other water craft.*—Wilfully destroying if it or the property aboard is worth \$50, is punishable by penitentiary 1 to 10 years; if of less value, fine not over \$500 or jail not over 12 months, or both (Code, § 4466).

(d) *Killing or injuring, horse, cattle, or other beast, dog, or fowl.*—See *Animals, etc.*, section 12, (2), (3), (4).

(e) *Canal, railroad, electric railway, or power company, bridge, fixture, etc.*—Maliciously to injure, obstruct, remove, etc., thereby putting lives in peril, is punishable by penitentiary 2 to 10 years; and in case of death, the offense is murder; unlawfully, but not maliciously committing the offense, is punishable by penitentiary 1 to 3 years, or jail not over 12 months and fine \$100 to \$500 (Code, § 4468).

(f) *Trespasses against railroads.*—See *Railroads and Railroad Companies*, section 8.

(g) *Telephone lines.*—Maliciously to injure phone or lines, to copy message, or obstruct sending message, or to conspire to do so, is fineable not over \$500, or jail not over 12 months, or both (Code, §§ 4477, 4782).

(h) *Light and power companies.*—Theft or unlawful interference with, is fineable not over \$500, or jail not over 12 months, or both (Code, § 4478).

(i) *Unauthorized use of automobiles or motor vehicles.*—This is fineable not over \$500, or jail not over 12 months, or both (Code, §§ 4480, 4782).

(j) *Cemeteries, burial grounds, etc.*—Wilful injuries as to, is punishable by a fine not over \$100 or jail not over 6 months (Code, § 4553). Robbing a grave is a felony (Code, § 4552). See, also, *Burying Grounds*.

II. CIVIL CASES

§ 3. *In general.*—Civil injury may be done to one's property in various ways; as, in the cases of the injuries mentioned in section 2, (1), above, and in many of the special instances mentioned in section 2, (2), above, for which the trespasser may be made to pay damages in addition to being punished as a criminal. It matters not whether the damage be done by the defendant himself or by his servant, agent or employee by his direction, either being liable, and if a man keeps a dog or other brute animal used to do mischief, as by worrying sheep or the like, or likely, from its nature, to do mischief, the owner must answer for the consequences, if he knows of such evil habit or nature. Also, to set traps on one's land, but baited with strong scented bait alluring the neighboring dogs from the owner's premises or from the highway, makes the trapper liable.

It is also a trespass to take one's property unlawfully, for which detainee lies—see *Detinue*; or if the one's property be appropriated by another to his own use, the trespass is remedied by suing for its value and damages, in "trover"—see *Trover and Conversion*.

Also, going on another's land without lawful authority, by one's self, servants or cattle, and doing some damage

thereto, however small, though it be only treading down his grass, is a trespass for which damages may be recovered (4 Min. Inst. 547, 566.)

(2) *Injuries and trespasses by animals.*—See *Animals, Fowls, etc.*, section 9.

(3) *Injuries to animals.*—See *Animals, Fowls, etc.*, section 10.

§ 4. Form of "description" in warrant or indictment—

No. 1. UNLAWFUL TRESPASS GENERALLY

(Code, § 4479.)

DESCRIPTION:

"did unlawfully, but not feloniously, deface and injure, (or *injure and destroy*) a certain (naming the property, real or personal), not the property of the said C. D., but the property of the said A. B., by (here state briefly the injury)."

No. 2. UNLAWFULLY CARRYING AWAY PROPERTY

(*Idem.*)

DESCRIPTION:

"did unlawfully, but not feloniously take and carry away certain (stating what), not the property of the said C. D., but the property of the said A. B."

No. 3. UNLAWFUL TRESPASS AGAINST MONUMENTS

No. 4. INJURING OR REMOVING A MONUMENT ERECTED TO DESIGNATE BOUNDARIES

(*Idem.*)

DESCRIPTION:

"did unlawfully, but not feloniously, deface (or *break down, injure, and remove*) a certain monument, erected for the purpose of designating the boundaries of the town (or city) of—."

No. 5. INJURING OR DESTROYING A LINE TREE

(*Idem.*)

DESCRIPTION:

"did unlawfully, but not feloniously, cut down and destroy a certain tree, marked for the purpose of designating the boundaries of the adjoining lands of the said A. B. and one E. F."

No. 6. INJURING OR REMOVING A TOMBSTONE
(Code, § 3795.)

DESCRIPTION:

"did wilfully and maliciously mutilate, deface, and injure (or *destroy or remove*) a certain tombstone placed in the — cemetery (or *grave-yard*) to mark the grave and last resting place of E. F., deceased."

No. 7. INJURING OR REMOVING A FENCE AROUND A GRAVE
(*Idem.*)

DESCRIPTION:

"did willfully and maliciously mutilate, deface, and injure (or *destroy or remove*) a certain (naming the property, real or personal), not the *grave-yard*) for the protection and ornament of the tomb and last resting place of E. F., deceased."

No. 8. INJURING OR DESTROYING A TREE, PLANT, OR SHRUB IN A CEMETERY
(*Idem.*)

DESCRIPTION:

"did unlawfully and maliciously cut, break, and injure (or *destroy or remove*) a certain tree, shrub, or plant in the — cemetery."

TRIALS

See Criminal Law and Procedure; Pleading and Its Incidents

§ 1. Several steps and incidents of trials:—

- (1) *Court docket.*—See 4 Min. Inst. 808.
- (2) *Continuance.*—See 4 Min. Inst. 808; Burks' Pl. & Pr., § 241 & seq.
- (3) *Removal of cause.*—See 4 Min. Inst. 808 & seq.; and Code, §§ 6175-7.
- (4) *Trial.*—See 4 Min. Inst. 812 & seq.
- (5) *Opening statement to jury.*—See 4 Min. Inst., 824: Burks' Pl. & Pr., §§ 254-5; and Code, § 4905.
- (6) *Evidence.*—See 4 Min. Inst. 824 & seq., and title *Evidence*.

- (7) *Bill of exceptions or certificate*.—See 4 Min. Inst. 897, 912; Burks' Pl. & Pr., § 281 & seq.; and Code, §§ 6252-3.
- (8) *Argument to jury*.—See 4 Min. Inst., 903; Burks' Pl. & Pr., §§ 292-6; and Code, § 6255.
- (9) *Instructions to jury*.—See 4 Min. Inst. 918; Burks' Pl. & Pr., § 265 & seq.; and Code, § 6003.
- (10) *Demurrer to evidence*.—See 4 Min. Inst. 920; Burks' Pl. & Pr., § 256 & seq.; and Code, § 6117.
- (11) *Adjournment and discharge of jury*.—See 4 Min. Inst. 905.
- (12) *Special verdict*.—See 4 Min. Inst., 923.
- (13) *Case agreed, or special case*.—See 4 Min. Inst. 925.
- (14) *Verdict*.—See 4 Min. Inst. 906; Burks' Pl. & Pr., § 297 & seq.
- (15) *Motion for new trial*.—See 4 Min. Inst., 928 & seq.; Burks' Pl. & Pr., § 303; and Code, §§ 3522, 6026, 6251, 6254, 6260.
- (16) *Motion in arrest of judgment*.—See 4 Min. Inst. 939 & seq.; Burks' Pl. & Pr., § 305.
- (17) *Motion for judgment notwithstanding verdict*.—See 4 Min. Inst., 946; Burks' Pl. & Pr., § 306.
- (18) *Motion for repleader*.—See 4 Min. Inst., 948; Burks' Pl. & Pr., § 307.
- (19) *Motion for venire facias de novo*.—See 4 Min. Inst. 950 & seq.; Burks' Pl. & Pr., § 308; Code, § 6002.
- (20) *Change of parties by death or otherwise*.—See 4 Min. Inst. 975 & seq., and title *Parties (Change of)*.
- (21) *Judgment*.—See 4 Min. Inst. 954 & Seq.; Burks' Pl. & Pr., § 320 & seq., and title *Judgment Lien*.
- (22) *Execution*.—See 4 Min. Inst. 984 & seq., and title *Execution*.
- (23) *Appeal*.—See 4 Min. Inst. 1050 & seq., and title *Appeals*.

§ 2. Statutory provisions:—

- (1) *Trial and its incidents in criminal cases*.—See *Criminal Law and Procedure*, sections 12 to 19. For general provisions as to proceedings in criminal cases, see Code, §§ 4967-86. For change of venue, see section 3, below.
- (2) *Trial in civil cases*.—For court docket, inquiry of damages, trial by jury, and judgments and decrees for money, see Code, §§ 6243-65, and Acts 1922, amending § 6245.

For general provisions as to civil cases, see Code, §§ 6373-7.

§ 3. **Change of venue.**—See 4 Min. Inst. 1173-5; Burks' Pl. & Pr., § 186; 124 Va. 1; *Criminal Law and Procedure*, section 13, (10). See, also, *Removal of Causes*.

TROVER AND CONVERSION

(See "Burks' Pleading and Practice" (new ed.), same title.)

See *Detinue; Justice of the Peace*, div. I., section 3, (1)

§ 1. **Definition.**—This is an action for the recovery of damages for the wrongful conversion of another's property to one's own use. (4 Min. Inst. 542.)

§ 2. **What necessary to support trover and conversion.**—To support an action of trover, as it is briefly called, the plaintiff must have had, at the time of the conversion, an absolute or special property in the thing in controversy, and also the actual possession or the right to immediate possession of it. The conversion may be by wrongfully taking or detaining the property or by illegally using or misusing it, or assuming ownership over it. (4 Min. Inst. 543-4.)

§ 3. **Form of warrant of trover.**—[See *Justice of the Peace*, div. I., section 4, No. 5.]

TRUSTS AND TRUSTEES

See *Deed of Trust*

- § 1. **Definition of trust; kinds**
- § 2. **Express trust**
- § 3. **Resulting trust**
 - (1) Resulting trust for grantor's benefit
 - (2) Resulting trust for third person's benefit
 - (a) Of equitable conversion
 - (b) Where land conveyed to one, while consideration is paid by another

- (c) Conveyance to one partner of land paid for with partnership funds
- (d) One of joint grantees paying purchase money beyond his proportion
- § 4. Constructive trusts
- § 5. General rules governing trust estates
- § 6. Trust estate liable to debts and charges of beneficiary; certain spendthrift, trusts excepted
- § 7. Rights of the beneficiary
- § 8. Status of a purchaser of the trust subject
- § 9. When purchaser to see to application of purchase money
- § 10. Duties and obligations of trustee
 - (1) General duties
 - (2) Trustee may ask aid of court in case of doubt or difficulties
 - (3) Trust estate not to be used for private advantage
 - (4) Trustee to indemnify beneficiary for breach of trust
 - (5) Trustee to preserve the trust property
 - (6) Trustee's duty as to investments and security
- § 11. Joint action of several trustees
- § 12. Trustee's compensation
- § 13. Trustee declining the trust
- § 14. Substitution of trustee, in case of vacancy; bond; removal
- § 15. Vague and indefinite trusts
- § 16. Charitable, religious, and educational trusts

§ 1. **Definition of trust; kinds.**—A trust is a right of property, real or personal, held by one person, called the trustee, for the use or benefit of another, called the beneficiary. As to origin they may be classed as express and implied. An implied trust is one not expressed, but deducible from the nature of the transaction as a matter of intent, called a resulting trust; or one imposed by equity upon the owner of the property, upon certain principles of natural justice or equity, independently of the intention of the parties, called a constructive trust.

§ 2. **Express trust.**—This is one created in express terms in the deed, will, or other writing. It is not necessary, especially in a will, to use the word "use" or "trust," or other technical language. The question for the court is, "what does the language mean?" If, fairly interpreted, the language means, the property is intended for another's use or benefit, it is a trust; otherwise, if only a wish or hope or desire is expressed. In many cases it seems almost a guess by the court what was really intended. Express trusts are

found in wills, marriage settlements, mortgages, deeds of trust, general assignments, and other conveyances and contracts.

§ 3. Resulting trust.—An implied resulting trust (see section 1, above) may be for the benefit of the grantor or testator, or for the benefit of a third person. (1) *Resulting trust for grantor's benefit.*—The grantee or party taking under a will takes the legal estate only, the equitable interest, or so much as remains undisposed of, or fails to take effect, results to the grantor or testator, or his heirs. Oral evidence may be used to repel such a trust arising by operation of law, but not where gathered from the terms of the instrument itself. A resulting trust arises, (a) where a conveyance of land is made without any consideration or any declaration of uses, and not intended as a gift; but a consideration stated cannot be disproved by oral evidence, in the absence of fraud or mistake; (b) where a conveyance is made to a trustee, and a trust is declared as to part of the estate conveyed, but the conveyance is silent as to the residue; (c) where the conveyance is upon such trusts as shall be appointed, and there is a default of appointment; (d) where a trust is created by a will, but the beneficiary is not disclosed or discoverable from the will, in which case oral evidence is not admissible, in the absence of fraud, to show how was intended; or (e) where land is conveyed upon particular trusts, which fail to take effect, as, where a testator devises lands to a trustee in trust to sell and apply the purchase money in a particular manner, which cannot be done, the fund, though now money, will result as land to the heir. (1 M's Real Prop., §§ 468-9.)

(2) *Resulting trust for third person's benefit.*—These trusts are in cases:

(a) *Of equitable conversion.*—As, where a contract is made for the sale of land, the seller is regarded in equity as the trustee for the purchaser, and the purchaser as trustee of the money for the seller, the purchaser's interest being treated as real estate, and the seller's interest as personalty—see, also, *Real Estate*, section 1, (1).

(b) *Where land conveyed to one, while consideration is paid by another.*—This may be shown by oral evidence. The payment must be at the time or before the purchase.

The presumption of a trust may be repelled by evidence or inference from the relation of the parties; as, in case of a parent, guardian, or the grantee's husband, there is no trust for them, but it will be presumed they intended to make a provision for the child or wife, unless, indeed the contrary clearly appears.

(c) *Conveyance to one partner of land paid for with partnership funds.*—This may be shown by oral evidence, and oral evidence may be used to repeal the trust. See *Partnerships*.

(d) *One of joint grantees paying purchase money beyond his proportion.*—He has a lien for the excess, and likewise in the case of repairs and improvements, and a trust is raised in his favor for the amount. (1 M's Real Prop., §§ 473-7.)

§ 4. Constructive trusts.—These arise independently of the intention of the parties by construction of law, being fastened upon the conscience of him who has the legal estate, in order to prevent a fraud, actual or constructive; as (1) where a conveyance is made to a trustee personally, but is paid for in trust money, which may be shown by oral testimony, where only part trust money is used, the trust creates a lien for that amount: (2) where a renewal of a lease is obtained in his own name by a trustee, or other person standing in a confidential relation: (3) where a purchase of the trust estate, is made by trustee, as, where he purchases claims or incumbrances against the trust estate at a discount; and likewise as to the dealings of a joint tenant or co-parcener or an agent: (4) where fraud has occurred in obtaining a conveyance, as, where an heir prevents a will to another by personally promising to make the transfer personally, or an agent to buy an estate for his principal buys it for himself. (1 M's Real Prop., §§ 478-82.)

§ 5. General rules governing trust estates.—They are in general the same as in case of legal estates, except a purchaser for valuable consideration and without notice of the trust is not bound to execute it. They may be conveyed, willed, or inherited and are subject to dower or curtesy and liable to escheat (Code, § 514), like legal estates.

An equitable estate will not support an action of ejectment or unlawful detainer; nor a defense thereto, except in

two cases, (1) where the defendant has a contract of purchase and entitled to a conveyance; and (2) where in an action by a mortgagee or trustee against the mortgagor or grantor the defendant can prove the payment of the whole or the full accomplishment of the trust, and so entitled to a reversion of the legal title in him (Code, §§ 5471-3). (1 M's Real Prop., §§ 483-6.)

As to liability for debts, see section 6, below.

§ 6. Trust estate liable to debts and charges of beneficiary; certain spendthrift trusts excepted.—Trust estates are liable at common law and by statute (Code, § 5157) to the debts and charges of the beneficiary, and are subject to the lien of a judgment or execution. In the case of personality, the estate may be levied on, unless the trust is so indefinite as to cause a sacrifice by sale, the proper remedy then being in equity, as, in the case of mortgages and deeds of trust to secure debts, or any unascertained equitable interest, such as a trust for the maintenance of a family; though otherwise where the trust is to permit husband and wife to enjoy all the interests and profits of the property during marriage. (1 M's Real Prop., § 484.)

As to liability of trust estates for debts there are now an exception in the case of certain "spendthrift trusts." A spendthrift trust is where property is conveyed to a trustee to hold for a certain person (supposedly a spendthrift) for his life and not to be subject to any claim by his creditors or power by him to transfer the property. Such trusts have been held in Virginia to be void (100 Va. 169, 173, 179). But the Revisors of the new Code have allowed certain spendthrift trusts (supposedly valid), by adding the following to section 5157 of the Code: "But any such estate not exceeding \$100,000 in actual value, may be holden or possessed in trust upon condition that the corpus (i. e., body or principal) thereof and income therefrom, or either of them, shall be applied by the trustee to the support and maintenance of the beneficiaries without being subject to their liabilities or to alienation (i. e., transfer) by them, but no such trust shall operate to the prejudice of any existing creditor of the creator of such trust."

§ 7. Rights of the beneficiary.—A court of equity will

compel trustees, (1) to permit the beneficiary to receive the rents and profits of the land; (2) to execute such conveyances as the beneficiary shall direct; and (3) to defend the title of the land in any court of law or equity. But the beneficiary is entitled to a conveyance only where the whole of the trust belongs to him and the instrument does not forbid and the trustee is clothed with no discretion in the management of the trust. (1 M's Real Prop., § 487.)

§ 8. Status of a purchaser of the trust subject.—If with notice, he becomes a constructive trustee and must execute the trust, however valuable the consideration paid; and if he sells to an innocent purchaser without notice, whereby it is exempted from the trust, he is personally responsible to the beneficiary for the value of the property; and if the trustee sacrifices the property, both he and purchaser are *prima facie* liable. A trustee's conveyance, however irregular, passes the legal title. And a purchaser for value and without notice is not affected by any latent or hidden equity, whether a lien, trust, fund, or other claim. (To be an innocent purchaser he must have paid a valuable consideration ("love and affection" not sufficient), and has or is entitled to call for a conveyance of the legal title before he had notice of the trust. This notice may be actual knowledge of the fact or such facts from which notice may be inferred, or by recordation. (1 M's Real Prop., § 489.)

By statute (§ 5200), it is provided: "And as against any person claiming under a deed or other writing which shall not have been admitted to record before payment by a subsequent purchaser for valuable consideration of the whole or a part of his purchase money, such subsequent purchaser, notwithstanding such deed or other writing be admitted to record before he becomes a complete purchaser, shall, in equity, have a lien on the property purchased by a subsequent purchaser for valuable consideration of the whole or a part of his purchase money, such subsequent purchaser, notwithstanding such deed or other writing be admitted to record before he becomes a complete purchaser, shall, in equity, have a lien on the property purchased by him, for so much of his purchase money as he may have paid before notice."

§ 9. When purchaser to see to application of purchase money.—In equity, a purchaser with notice of a trust, if the trustee is not expressly or impliedly given power to receipt, must see that the purchase money reaches the proper parties—in other words he should take their receipts, unless indeed the trust-deed expressly provides that he shall not be so bound.

There can be no implied power in the trustee to give receipts, where the purchaser has no notice. If the instrument, expressly or impliedly, designate the person to whom the trustee is to pay the money, even though nothing be said about receipts, the power to give receipts is implied; as, in an ordinary deed of trust to secure debts, or where the trustee is authorized to sell and reinvest; but if such sale is a breach of trust, of which the purchaser has notice, he takes subject to the trusts. If there is any uncertainty as to whom the trustee is to pay, or the amount to be paid, the power to give receipts will be implied. To hold the purchaser liable to application of purchase money, the trust must be of a definite and limited nature: as, in the case of trusts to pay legacies, annuities, or scheduled debts, either where the lands are given to be sold, or are only charged with the payment of debts; or where the trust is to build a house or to pay a specific debt. On the other hand, where the trust is general and unlimited in its nature, or likely to be of long continuance, the purchaser is not bound to see to the application of the purchase money: as, trusts to pay debts not scheduled, or to pay both debts and legacies, or to invest money for several subjects more or less distant. (1 M's Real Prop., §§ 490-6.)

§ 10. Duties and obligations of trustee.—

(1) *General duties.*—He is bound in general to do whatever is necessary and proper for the due execution of the trust; to defend the title at law, and if useful and practicable to give notice to the beneficiary of any suit affecting the title; to prevent waste or injury to the trust property; to keep regular accounts; to obtain, if possible, and to afford the beneficiary, accurate information touching the trust subject; to act with reasonable diligence; to exercise, in case of a joint trust, due caution and vigilance touching the approval of and acquiescence in the acts of his co-trustees; and if the instrument creating the trust contains any special directions,

compel trustees, (1) to permit the beneficiary to receive the rents and profits of the land; (2) to execute such conveyances as the beneficiary shall direct; and (3) to defend the title of the land in any court of law or equity. But the beneficiary is entitled to a conveyance only where the whole of the trust belongs to him and the instrument does not forbid and the trustee is clothed with no discretion in the management of the trust. (1 M's Real Prop., § 487.)

§ 8. Status of a purchaser of the trust subject.—If with notice, he becomes a constructive trustee and must execute the trust, however valuable the consideration paid; and if he sells to an innocent purchaser without notice, whereby it is exempted from the trust, he is personally responsible to the beneficiary for the value of the property; and if the trustee sacrifices the property, both he and purchaser are *prima facie* liable. A trustee's conveyance, however irregular, passes the legal title. And a purchaser for value and without notice is not affected by any latent or hidden equity, whether a lien, trust, fund, or other claim. (To be an innocent purchaser he must have paid a valuable consideration ("love and affection" not sufficient), and has or is entitled to call for a conveyance of the legal title before he had notice of the trust. This notice may be actual knowledge of the fact or such facts from which notice may be inferred, or by recordation. (1 M's Real Prop., § 489.)

By statute (§ 5200), it is provided: "And as against any person claiming under a deed or other writing which shall not have been admitted to record before payment by a subsequent purchaser for valuable consideration of the whole or a part of his purchase money, such subsequent purchaser, notwithstanding such deed or other writing be admitted to record before he becomes a complete purchaser, shall, in equity, have a lien on the property purchased by a subsequent purchaser for valuable consideration of the whole or a part of his purchase money, such subsequent purchaser, notwithstanding such deed or other writing be admitted to record before he becomes a complete purchaser, shall, in equity, have a lien on the property purchased by him, for so much of his purchase money as he may have paid before notice."

rate from his own in bank; otherwise, if the bank fails, he is liable for the loss. (1 M's Real Prop., § 503.)

(6) *Trustee's duty as to investments and security.*—He should invest only in stocks or securities sanctioned by the usage of courts of equity; never in mere personal securities; he must either secure the fund on real estate, or by something of permanent value. And where he sells on credit, he must take other than personal security for the price. (1 M's Real Prop., §§ 504-5.)

§ 11. *Joint action of several trustees.*—Joint trustees have all equal power, interest, and authority, and cannot act separately, but must all join in conveyances and receipts. But where one receives and controls the money, the other writing in the receipt does not make him liable, if there is no culpable negligence on his part. (1 M's Real Prop., § 509.)

§ 12. *Trustee's compensation.*—Reasonable compensation, reasonable actual expenses, and loss or damage in the proper execution of the trust, are allowed him. (1 M's Real Prop., §§ 510-11.)

§ 13. *Trustee declining the trust.*—If he is not willing to serve, he ought in due form to disclaim the legal title vested in him, which, in case of a trust of a freehold of inheritance, or for a term over five years, should be by deed or writing under seal. In his place a new trustee may be substituted—see section 14, below. (1 M's Real Prop., § 516.)

§ 14. *Substitution of trustee, in case of vacancy; bond; removal.*—Equity will never suffer a trust to fail for want of a trustee; but upon a bill for the purpose, or by statute (§ 5302), "in a suit pending to enforce or administer the trust, may exercise all the powers of" the law courts to substitute trustees upon motion.

By statute (§§ 6298-6300), as to such substitution on motion, it is provided that when a trustee in a will, deed, or other writing dies, or removes from the State, or declines to accept the trust, or resigns the same, as he may be allowed to do, upon motion after reasonable notice to all other parties interested in the execution of the trust, the circuit or corporation (or other) court, where the will is admitted to probate or the deed or other writing is or might have been recorded, or the judge thereof in vacation, upon satisfactory

evidence of such death, removal, declination, or resignation, "may appoint a trustee or trustees in the place of the trustee named in such deed" (should be "instrument," for a will is not a "deed"). If any party be a minor, the notice is served on his guardian *ad litem* appointed by the court or clerk; or if any one be insane or a convict, the notice is served on his committee, but if none, then on a guardian *ad litem* appointed by the court or clerk. No notice need be given to a non-resident trustee, nor to one who has declined or resigned the trust, nor to one's administrator or executor. Until such motion is made, the administrator or executor of a sole deceased trustee, or if one or more of several trustees die, resigns, or removes from the State, or declines the trust, the remaining one or ones executes the trust, or so much thereof as remains unexecuted, unless the instrument otherwise directs or a court of equity has made the appointment. It is expressly provided that the above sections (6298-6300) shall not apply to literary and educational trusts; as to which section 590 of the Code provides, "when any such gift, grant or will is recorded, and no trustee has been appointed, or the trustee dies, or refuses to act, the court, on motion of the Attorney for the Commonwealth, appoints one or more trustees to carry the same into execution."

The above statutes do not apply to trustees who exercise a discretionary power or one of personal confidence, and a court of equity cannot interfere with him so long as he acts in good faith; and it seems if an uncontrollable discretion be vested in several trustees jointly, without words of survivorship, the death of one ends the discretion, and it cannot be exercised by the others (97 Va. 435, 442). (1 M's Real Prop., §§ 518-19.)

By section 6296 of the Code, a court of equity may appoint a commissioner to execute a deed or writing.

For change of trustees in case of building and loan associations, see *Building and Loan Association, etc.*, section 8.

By section 6301 of the Code, upon motion of a person interested, after reasonable notice, the court or judge in vacation may, if deemed proper for the security of the estate, order the trustee to give bond for the faithful execution of the trust, and if same is not given, remove him and appoint another trustee in his place.

By section 6303 of the Code, provision is made for the appointment by the court, in a suit in equity, of a trustee in place of one who has died, if his administrator or executor and other persons interested be parties, although the heirs be not parties.

Substituted trustees occupy the same status as those in whose place they are appointed. (Code, § 6304.)

§ 15. Vague and indefinite trusts.—In order that a court of equity may carry trusts into effect, they must be certain and definite as to the objects or persons who are to take, and also as to the subject-matter. Where they are vague and indefinite in either of these particulars, they are void, and a trust results to the giver; as a gift to be distributed among the most deserving of the giver's family; or a gift for such uses as the executors shall think fit. A general description by classes may often be sufficient; as "sons," "children," etc., and even "family" and "relations," where the context fixes clearly who are to take. (1 M's Real Prop., § 521.)

§ 16. Charitable, religious, and educational trusts.—Charitable and religious trusts are often void because the beneficiary or the purpose is too vague, uncertain, or indefinite, as is especially the case where the beneficiary is an unincorporated association, such as a religious congregation or other voluntary society. Thus a trust for "the Baptist Association that for common meets at Philadelphia"; for "needy, poor and respectable widows"; for the "Roman Catholic Congregation residing in Richmond"; for "the trade of the town of Alexandria," are void. A gift to a corporation (though foreign and religious) for its general purposes, is valid (107 Va. 79).

As soon as persons subscribe to a charitable trust, their right and interest in their subscriptions are completely divested, and they cannot (but only the Attorney-General, trustees or beneficiaries can) complain, in equity, even for gross misfeasance or fraud. (1 M's Real Prop., § 522.)

The legislature has favored charitable and educational more than religious trusts. Thus, gifts, grants, and wills for educational, literary, or charitable purposes may be made to a person, corporation, or unincorporated association, except a will to or for the use of an unincorporated theological

seminary (Code, § 587, etc). Trusts for benevolent associations, such as free masons, odd-fellows, sons of temperance, etc., are rendered valid, with certain qualifications (Code, §§ 47, etc., 39, 42 (as amended by Acts 1920, pp. 9, 45, 46). Also, for cemeteries (Code, §§ 50, etc.; 59, as amended by Acts 1920, p. 9). As to religious trusts, land may be conveyed and personal property transferred by gift, grant, or will, pretty freely, for the use or benefit of any religious congregation for certain specified purposes, as, a place of worship, parsonage, etc., it being expressly provided that such trusts shall not fail or be declared void for insufficient designation of the beneficiaries or the objects of the trust, where lawful trustees of the church or congregation are in existence, or said congregation is capable of securing the appointment of such trustees upon application as prescribed by law (Code, §§ 38, 39, etc.). But no will of land for such purposes is valid, if vague and indefinite, as it must ordinarily be, since our constitution (§ 59) prohibits the incorporation of any church or religious denomination (though not, of church agencies, as boards or committees—84 Va. 125). (2 Min. Inst., p. 614.) See, also, *Church and Church Property*.

TURNPIKES AND TURNPIKE COMPANIES

See Corporations

§ 1. Creation of turnpike companies; costs.—They are chartered like other public service corporations (other than railroads)—see *Corporations*, section 4; for costs, see section 5.

§ 2. Special provisions as to.—See Code, chapter 161, §§ 4074-97, and Acts 1918, p. 669, amending § 4078, and Acts 1922, amending § 4083.

§ 3. General provisions as to.—See the general provisions of the Code as to corporations in general (§§ 3776-3848, and Acts 1920, pp. 489, 494, 565, amending §§ 3780, 3846, 3847, respectively); and the general provisions of the Code as to public service corporations (§§ 3881- 3903, and Acts 1920,

pp. 411, 20, amending §§ 3885, 3897, respectively—see *Corporations*.

§ 4. **Miscellaneous provisions as to.**—See Code, § 2013 giving supervisors power to enact special and local legislation as to, and to control); § 2000 (how abandoned turnpike kept in order); §§ 3889-93 (sale, where State interested); §§ 4035-4037-8 (telegraph and telephone lines on); § 406 (water pipe lines along); §§ 3866, 4369, 4373 (eminent domain); § 3869 (extending line into other State, and branch lines); § 3885, as amended by Acts 1920, p. 411 (crossing public road or changing course); § 3887 (connecting with works of another); § 6066 (service of process on toll-gatherer); Acts 1918, p. 400 (members, employees, and agents of highway commission not to pay tolls); Acts 1918, p. 633 (transfer of the valley turnpike to the State); Acts 1918, p. 29 (tolls not to be collected from students going to or from school); Acts 1922, p. —, permitting turnpike companies to regulate and control travel and traffic on turnpike roads. For taxation of turnpike companies, see *Taxation and Tax Bill*.

UNINCORPORATED ASSOCIATIONS OR ORDERS

(From Hawkins' Legal Counselor, pp. 569-70.)

- § 1. Their status, nature, authority, and liability
- § 2. Membership protected
- § 3. Ratification of unauthorized acts
- § 4. How property held
- § 5. Suits by and against

§ 1. **Their status, nature, authority, and liability.**—Associations or orders, though unincorporated, are recognized by the law as having a status and an existence. Such associations and the members thereof have rights that may be enforced, and likewise may incur legal liabilities. Yet that status, those rights and those liabilities are not so well and so satisfactorily defined or certain as in the case of a corporation, the legal entity, unity and compactness of which are complete. It is usually more satisfactory to deal either with

a partnership or a corporation than an association which is neither, such as an unincorporated literary society, social club, church or charitable or beneficial association, or lodge, or order.

Contracts entered into by such associations are usually effected through some individual or committee, and whether they have authority to act or not depends for the most part upon the law of agency (see *Agents and Agency*), for it is in the capacity of agent of the association that they contract if at all. They can do nothing to bind the members except what they are authorized to do by the articles of association or by by-laws of the organization duly adopted, or by a majority vote of the organization duly and regularly passed. They can not go beyond the express limits of their authority. They can not deal on credit or borrow money or give notes or the like, without express authority, and persons dealing with them if they expect to hold the association and its members generally liable should know beforehand that they can prove the existence of this authority.

Unless the articles of association or by-laws of the organization provide otherwise all the members are bound by a vote of the majority in regular meeting or at a special meeting, duly called, with due notice of the time and place thereof given to each member, which notice should also contain information as to the business to be acted upon. The will of the majority, however, will not control in connection with a proposed change in the fundamental principles or purposes of the association and no one can be compelled by any vote to be drawn into a project entirely foreign to his original purpose and intent when he joined the organization. Yet with regard to ordinary matters the very fact that one becomes a member raises an implied contract on his part to abide by the will of the majority.

§ 2. Membership protected.—Membership in such an association is regarded as a right, or as legal property in the possession of which one is entitled to legal protection. A member may not be expelled for insufficient reasons, or without fair opportunity of being heard and offering a defense. A member may be expelled for any offense set forth in the by-laws after proper proceedings, that is, if the by-law itself

be reasonable for no association can undertake to expel members without cause or without a reasonable cause, or from improper motives. He may be expelled if he has been convicted in the regular way by a jury for an offense of so infamous a nature as to render him unfit for the society of honest men, such as perjury, forgery and the like; also where he has clearly violated his duties to the corporation. The acts of the association will be usually sustained, however, if done in good faith. Persons illegally expelled may institute legal proceedings to restore their rights.

§ 3. Ratification of unauthorized acts.—Members of an unincorporated association, or order, may render themselves liable on an obligation incurred without authority by subsequently ratifying or acquiescing in the act done. Subscriptions by the membership may be enforced if the conditions of the subscriptions are complied with.

§ 4. How property held.—The property of an unincorporated association or order, is held by the members in common. Each, it may be said, owns an undivided part of it, and unless the right of disposition thereof has been surrendered by the members to the majority or to some body elected by the association, in pursuance of the articles of association or by-laws adopted before the acquisition of the property, awkward questions are likely to arise for no portion of the members would have a right to control the disposition of the interest of the remaining portion in the property, and this fact might result in an expensive proceeding in equity. Commonly, however, property is purchased in the name of the trustees elected by the association, and control over the same is regulated by the by-laws.

§ 5. Suits by and against.—See *Suits and Actions*, section 3.

UNITED STATES CONSTITUTION

- § 1. Scope of treatment
- § 2. Scope and authority of U. S. Constitution
- § 3. Interstate commerce, art. I., §8, cl. 3
- § 4. Ex post facto laws; laws impairing obligation of contracts,

art. I, §10, par. 1.

§ 5. Full faith and credit provision, art. IV., §1.

§ 6. Privileges, etc., of citizens in other states, art. IV., §2, par. 1 and 14 Amend., §1.

§ 7. Guarantees in criminal cases, 4th, 5th, and 6th Amendments

§ 8. Prohibition (18th Amendment)

§ 1. **Scope of treatment.**—Here we give with construction only such parts of the U. S. Constitution as are specially applicable to the states and are of general utility.

§ 2. **Scope and authority of U. S. Constitution.**—The Constitution of the United States is a source and grant of power to the Congress of the United States. It is an enabling, and not a restraining instrument. Congress can do nothing except what the Constitution, either directly or by reasonable construction, authorizes it to do. The Constitution of Virginia, however, is a restraining instrument, and the legislature of the states possesses all legislative power not prohibited by the Constitutions. (91 Va. 726.)

Article VIII., of the Amendments to the Constitution provides that, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people;" and article X, provides that, "The powers not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The U. S. Constitution is supreme over the State Constitution; and it has been held that a State court has jurisdiction to decide that a provision of the Constitution of the State is in violation of the Constitution of the United States. (22 Grat. 266.)

§ 3. **Interstate commerce** (art. I., § 8, cl. 3).—See *Interstate Commerce*.

§ 4. **Ex-post facto laws; laws impairing obligation of contracts** (art. I., § 10, par. 1).—See *Statutes*, section 5.

§ 5. **Full faith and credit provision** (art. IV., § 1).—The section provides: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof."

Congress has provided that "the said records and judicial proceedings * * * shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." For similar provisions of the Virginia statute, also telling how the records, etc., may be authenticated, see Code, §§ 6205-6.

§ 6. Privileges, etc., of citizens in other states (art. IV., § 2, par. 1 and 14 Amend., § 1).—The first provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The immunities and privileges secured to all the citizens of the United States by this section, are the rights to protection by the government, the enjoyment of life and liberty, to acquire and possess property of every kind, and to pursue happiness and safety. The Constitution, however, recognizes the distinction between the character or status of a citizen of the United States, and that of one of the individual states; some rights belonging exclusively to citizens of a particular state, as the right to vote, to hold office, and the like. Thus it has been held competent for the State to confine the right of planting oysters to its own citizens; that in the regulation of internal police, a different mode of procedure may be prescribed as to non-residents, as, confining the searching of vessels for slaves to those owned by non-residents. But corporations are not "citizens," under this provision, and a state may grant upon terms, or even to refuse to non-resident corporations, the privilege of engaging in business here; and so a license tax upon an agent or sub-agent located here, of a foreign insurance company, is not unconstitutional. (27 Grat. 985; 16 Grat. 139; 13 Grat. 767; 94 U. S. 391; 8 Wall. 168.)

The 14th Amendment (§ 1) provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. This section, like the 15th Amendment

(as to right to vote), refers exclusively to state action, legislative, executive, or judicial, and does not apply to any action of private individuals (106 Va. 189). See *Due Process of Law*.

As to "class legislation", etc., section 6438 of the Code (as to liens of employees, etc., on franchises of transportation company), is not unconstitutional (101 Va. 599; see 106 Va. 327; 110 Va. 165, 171); nor is the fellow-servant law—see *Employer and Employee*, section 4 (109 Va. 44, 68); nor a "Jim Crow Law", providing separate coaches for the races (163 U. S. 537); but the former "Trading Stamps Act" is unconstitutional. (101 Va. 862, 868); so is the 2-cent passenger-rate order (106 Va. 61).

§ 7. **Guarantees in criminal cases (4th, 5th, and 6th Amendments).**—The following Amendments are all restrictive upon the national government, and have no application to the states; the 4th Amendment (as to search warrants); the 5th Amendment (as to form of accusation, former jeopardy (see *Criminal Law and Procedure*), testifying against self, being "deprived of life, liberty, and property, without due process of law" (see *Due Process of Law*), and the taking of private property for public use without just compensation); the 6th Amendment as to speedy and public trial, "being informed of the nature and cause of the accusation", "being confronted with the witnesses against him", and having compulsory process for obtaining witnesses, and "assistance of counsel"); and 8th Amendment (as to excessive bail and fines, and cruel and unusual punishments)—see 16 Grat. 139 (as to 4th); 20 Grat. 165, 848 (as to due process and former jeopardy, of 5th); 92 Va. 59 (as to 8th). For parallel provisions of the Virginia Constitution, see *Criminal Law and Procedure*, section 13, (3), (c); *Due Process of Law*; and *Eminent Domain* (as to taking or damaging private property without just compensation), sections 2 and 3. The 14th Amendment (as to due process) does expressly refer to the states—see section 6, above.

§ 8. **Prohibition (18th Amendment).**—See *Intoxicating Liquors*, sections 65 and 66.

UNIVERSITY OF VIRGINIA

For the several statutes as to, see Code, §§ 806-827, and Acts 1918; p. 538 (as to 119 scholarships); as to geological survey, §§ 828-33. For general provisions as to colleges, etc., see Code, §§ 986-1003.

UNLAWFUL ENTRY OR DETAINER

(See "Burks' Pleading & Practice" (new ed.), same title.)

See *Justice of the Peace*, div. III. (as to "Unlawful Detainer, before a Justice")

- § 1. Nature of the remedy
- § 2. Jurisdiction of action
- § 3. When possession is unlawfully detained
- § 4. Verdict, judgment, and writ of possession
- § 5. Forms of procedure before a justice

§ 1. Nature of the remedy.—This is a purely statutory remedy for the recovery of the possession of real estate, where there has been an unlawful or a forcible entry thereon, or where, when the entry is lawful and peaceable, the tenant detains or withholds the possession after his right has expired, without the landlord's consent; and the plaintiff need show only a right to the possession at the time of the action brought, no matter what right or title he had thereto, whether legal or equitable (Code, § 5445; 4 Min. Inst., 558-9.)

For the difference between this remedy and the action of ejectment, see *Ejectment*, section 2.

§ 2. Jurisdiction of action.—The action may be brought in court by suing out of the clerk's office, within three years (if over three, proceed in ejectment), a summons to answer the complaint of the plaintiff that the defendant is in possession and unlawfully withholds from the plaintiff the premises, describing them; or a declaration may be filed as in other actions. (Code, §§ 5445-6.) A justice has concurrent jurisdiction in certain cases—see *Justice of the Peace*, div. III.

§ 3. **When possession is unlawfully detained.**—For this subject, embracing tenancies from year to year, from month to month, etc., at will, and by sufferance, and how these tenancies are terminated, see *Justice of the Peace*, div. III., section 4.

§ 4. **Verdict, judgment, and writ of possession.**—See *Justice of the Peace*, div. III., sections 5 and 6.

§ 5. **Forms of procedure before a justice.**—See *Justice of the Peace*, div. III., section 7.

VAGRANTS

See Beggars

§ 1. **Who are vagrants.**—The statute names eight classes of vagrants; the most common form of whom, *prima facie*, is the beggar, loafer, wanderer, or idler, who has no visible property or means of support.—see Code, § 2808.

§ 2. **How dealt with.**—Upon complaint upon oath a justice or other officer empowered to issue criminal warrants, issues a warrant for the arrest of the vagrant, and upon conviction he is punished as for a misdemeanor—i. e., by a fine not over \$500 or jail not over six months, or both; or he may give bond with sufficient security, in penalty of not less than \$100 nor over \$500, for his future industry and good behavior for one year. That the defendant has made reasonable *bona fide* efforts to obtain employment at reasonable prices for his labor and has failed to obtain the same, is a sufficient defense to the charge of vagrancy. It is unlawful to discharge him on the condition that he leave the city or town. (Code, §§ 2809-10.)

By Acts 1922, p.—: “Any person who is a vagrant as defined by the laws of the State of Virginia, or who is physically incapable of supporting himself or herself, and in destitute circumstances, may, in the discretion of the justice or court before whom the case may be tried, be committed to the county or city poorhouse, alms house, or like institution.”

VENDOR'S LIEN

- § 1. Definition and nature
- § 2. Against whom lien enforced
- § 3. When lien not destroyed or waived
- § 4. Assignment of debt secured
- § 5. Effect of conveyance of property to another
- § 6. How vendor's lien enforced
- § 7. Limitation of enforcement of vendor's lien
- § 8. Vendor's lien distinguished from vendor's reservation of title
- § 9. Vendee's lien for purchase money paid under a contract of sale
- § 10. Satisfaction and release of vendor's lien
- § 11. Form under "Vendor's Lien"

§ 1. **Definition and nature.**—A vendor's lien is an equitable lien which a person conveying land (called vendor) has thereon for the payment unpaid purchase money, but since 1850, it has been provided that he shall not have such lien, which before was implied, "unless such lien is expressly reserved on the face of the conveyance" (Code, § 5183).

No particular form of words is required to reserve the lien; any words showing such intention is sufficient. But the words "in consideration of \$500 secured to be paid," is not sufficient (111 Va. 643; 95 Va. 285).

The lien gives the vendor no interest in the land—only a lien on it; so he is not a purchaser, like a mortgagor or creditor in a deed of trust, but a mere creditor, whose lien passes as personalty. But the vendee cannot by subsequent independent dealings bind the land to the prejudice of the vendor's interests, as, by laying off streets and alleys; so if the sale of the lots in the inverse order of their conveyance will not pay the lien, the land (including streets and alleys) will be sold as a whole (76 Va. 694 Va. 773; 95 Va. 285).

§ 2. **Against whom lien enforced.**—The lien may be enforced against the vendee (the grantee), his purchaser or grantee, with or without notice, and creditors, and other persons holding by, through, or under the vendee. (Note to Code, § 5183.)

§ 3. **When lien not destroyed or waived.**—It is not destroyed or waived by taking a new bond, note, etc., or even a judgment. The lien exists until it is clearly shown that it

out because of the vendor's fault. (1 M's Real Prop., § 689.)

A similar lien is created by statute (§ 5200), where the purchaser, having paid some or all of the purchase money, receives notice by recordation of a prior deed or writing before becoming a "complete purchaser". (102 Va. 319.)

For the statute, see at end of section 8, under *Trusts and Trustees*.

§ 10. Satisfaction and release of vendor's lien.—See *Deed of Trust*, section 15.

§ 11. Form under "Vendor's Lien".—

No. 1. *Application to Court to have Vendor's Lien Marked Satisfied*. (See No. 6 to 8 under *Deed of Trust*.)

VESSELS AND SEAMEN

§ 1. Wrecks.—See Code, §§ 3596-3612.

§ 2. Pilots.—See Code, §§ 3613-47.

§ 3. Ballast Masters.—See Code, §§ 3648-60.

§ 4. Seamen who desert their vessels.—See Code, §§ 3661-3.

§ 5. Harbor commissioners, harbor masters, and dock masters.—See Code, §§ 3664-92, and Acts 1920, p. 598, amending §§ 3665-7, 3673-4, and Acts 1920, repealing §§ 3665-8, 3670-7.

VIRGINIA MILITARY INSTITUTE

For the several statutes as to, see Code, §§ 834-52. For general provisions as to colleges, etc., see Code, §§ 986-1003.

VIRGINIA POLYTECHNIC INSTITUTE, ETC.

For various statutes as to the Virginia and Agricultural College and Polytechnic Institute, and Hampton Normal and Agricultural Institute, including the State Board of Crop Pest Commissioners, certain diseases of trees, the State Live

- § 29. How the lien may be lost
- § 30. Negotiable receipt must state charges for which lien is claimed
- § 31. Warehouseman need not deliver until lien is satisfied
- § 32. Warehouseman's lien does not preclude other remedies
- § 33. Satisfaction of lien by sale
- § 34. Perishable and hazardous goods
- § 35. Other methods of enforcing liens
- § 36. Effect of sale

PART III.—NEGOTIATIONS AND TRANSFER OF RECEIPTS

- § 37. Negotiation of negotiable receipts by delivery
- § 38. Negotiation of negotiable receipts by indorsement
- § 39. Transfer of receipts
- § 40. Who may negotiate a receipt
- § 41. Rights of person to whom a receipt has been negotiated
- § 42. Rights of person to whom a receipt has been transferred
- § 43. Transfer of negotiable receipt without indorsement
- § 44. Warranties on sale of receipt
- § 45. Indorser not a guarantor
- § 46. No warranty implied from accepting payment of a debt
- § 47. When negotiation not impaired by fraud, mistake, or duress
- § 48. Subsequent negotiation
- § 49. Negotiation defeats vendor's lien

PART IV.—CRIMINAL OFFENSES

- § 50. Issue of receipt for goods not received
- § 51. Issue of receipt containing false statement
- § 52. Issue of duplicate receipts not so marked
- § 53. Issue of receipts for warehouseman's goods which do not state that fact
- § 54. Delivery of goods without obtaining negotiable receipt
- § 55. Negotiation of receipt for mortgaged goods

PART V.—INTERPRETATION

- § 56. When rules of common law still applicable
- § 57. Interpretation shall give effect to purpose of uniformity
- § 58. Definitions

[This act was drafted by the Commissioners on Uniform State Laws and is in force in Iowa, New Jersey, Illinois, Massachusetts, Connecticut, New York, California, Kansas, Louisiana, Michigan, Nebraska, New Mexico, Ohio, Pennsylvania, Rhode Island, Tennessee, Wisconsin and others.]

PART I.—THE ISSUE OF WAREHOUSE RECEIPTS

- § 1. **Persons who may issue receipts.**—Warehouse receipts may be issued by any warehouseman. (Code, § 1290.)

§ 2. Form of receipts; essential terms.—Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

(a) The location of the warehouse where the goods are stored.

(b) The date of issue of the receipt.

(c) The consecutive number of the receipt.

(d) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.

(e) The rate of storage charges.

(f) A description of the goods or of the package containing them.

(g) The signature of the warehouseman, which may be made by his authorized agent.

(h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and

(i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt for any of the terms herein required. (§ 1291.)

§ 3. Form of receipts; what terms may be inserted.—

A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

(a) Be contrary to the provisions of this chapter.

(b) In anywise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. (§ 1292.)

§ 4. Definition of non-negotiable receipt.—A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt. (§ 1293.)

§ 5. Definition of negotiable receipt.—A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt.

No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provision, if inserted, shall be void. (§ 1294.)

§ 6. Duplicate receipts must be so marked.—When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase to be after the delivery of the goods by the warehouseman to the holder of the original receipt. (§ 1295.)

§ 7. Failure to mark "not negotiable."—A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "non-negotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable.

This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character. (§ 1296.)

PART II.—OBLIGATIONS AND RIGHTS OF WAREHOUSEMEN UPON THEIR RECEIPTS

§ 8. Obligation of warehouseman to deliver.—A warehouseman, in the absence of some lawful excuse provided by this chapter, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

- (a) An offer to satisfy the warehouseman's lien.
- (b) An offer to surrender the receipt if negotiable, with such endorsements as would be necessary for the negotiation of the receipt, and
- (c) A readiness and willingness to sign, when the goods

are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. (Id.)

§ 9. Justification of warehouseman in delivering.—A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is—

(a) The person lawfully entitled to the possession of the goods, or his agent.

(b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either endorsed upon the receipt or written upon another paper, or

(c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been endorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate endorsee. (§ 1298.)

§ 10. Warehouseman's liability for misdelivery.—Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either

(a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. (§ 1299.)

§ 11. Negotiable receipts must be cancelled when goods delivered.—Except as provided in section thirteen hundred and twenty-five, where a warehouseman delivers goods for which

he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to any one who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. (§ 1300.)

§ 12. Negotiable receipt must be cancelled or marked when part of goods delivered.—Except as provided in section thirteen hundred and twenty-five, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. (Id.)

§ 13. Altered receipts.—The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was—

- (a) Immaterial.
- (b) Authorized, or
- (c) Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration.

Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. (§ 1301.)

§ 14. Lost or destroyed receipts.—Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees.

The delivery of the goods under an order of the court as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. (§ 1302.)

§ 15. Effect of duplicate receipts.—A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability. (§ 1304.)

§ 16. Warehouseman cannot set up title in himself.—No title or right of the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt. (§ 1305.)

§ 17. Interpleader of adverse claimants.—If more than one person claim the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, which ever is appropriate, require all known claimants to interplead. (§ 1306.)

§ 18. Warehouseman has reasonable time to determine validity of claims.—If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods and the warehouseman has information of such claim, the warehouseman shall be excused from lia-

bility for refusing to deliver the goods either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. (§ 1307.)

§ 19. Adverse title is no defense, except as above provided.—Except as provided in the two preceding sections and in sections twelve hundred and ninety-eight and thirteen hundred and twenty-five, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. (§ 1308.)

§ 20. Liability for non-existence or misdescription of goods.—A warehouse man shall be liable to the holder of a receipt for damages caused by the non-existence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. (§ 1309.)

§ 21. Liability for care of goods.—A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. (§ 1310.)

§ 22. Goods must be kept separate.—Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor, for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited. (§ 1311.)

§ 23. Fungible goods may be commingled, if warehouseman authorized.—If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. (§ 1312.)

§ 24. Liability of warehouseman to depositors of commingled goods.—The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate. (§ 1313.)

§ 25. Attachment or levy upon goods for which a negotiable receipt has been issued.—If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court. (§ 1314.)

§ 26. Creditors' remedies to reach negotiable receipts.—A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from the courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process. (§ 1315.)

§ 27. What claims are included in the warehouseman's lien.—Subject to the provisions of section thirteen hundred and nineteen, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, in-

insurance, transportation, labor, weighing, coopering and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien. (§ 1316.)

§ 28. Against what property the lien may be enforced.—Subject to the provisions of section thirteen hundred and nineteen, a warehouseman's lien may be enforced—

(a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted, and

(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person had been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value, would have been valid. (§ 1317.)

§ 29. How the lien may be lost.—A warehouseman loses his lien upon goods—

(a) By surrendering possession thereof, or

(b) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this chapter.

§ 30. Negotiable receipt must state charges for which lien is claimed.—If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of section thirteen hundred and sixteen, although the amount of the charges so enumerated is not stated in the receipt. (§ 1318.)

§ 31. Warehouseman need not deliver until lien is satisfied.—A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. (§ 1319.)

§ 32. Warehouseman's lien does not preclude other remedies.—Whether a warehouseman has or has not a lien upon

the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. (§ 1320.)

§ 33. Satisfaction of lien by sale.—A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

(a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due.

(b) A brief description of the goods against which the lien exists.

(c) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the date of delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail, and

(d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of

the sale shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein.

From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this chapter, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. (Id.)

§ 34. Perishable and hazardous goods.—If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof.

The proceeds of any sale made under the terms of this

section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section. (§ 1323.)

§ 35. Other methods of enforcing liens.—The remedy for enforcing a lien herein provided does not preclude any other remedy allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. (§ 1324.)

§ 36. Effect of sale.—After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable. (§ 1325.)

PART III.—NEGOTIATION AND TRANSFER OF RECEIPTS

§ 37. Negotiation of negotiable receipts by delivery.—A negotiable receipt may be negotiated by delivery—

(a) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer, or

(b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent endorsee of the receipt has endorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt the goods are deliverable to bearer or where a negotiable receipt has been endorsed in blank or to bearer, any holder may endorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the endorsement of such endorsee. (§ 1326.)

§ 38. Negotiation of negotiable receipts by endorsement.—A negotiable receipt may be negotiated by the endorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such endorsement may be in blank, to bearer or to a specified person. If endorsed to a specified person, it may be again negotiated by the endorsement of such person in blank, to bearer or to an-

other specified person. Subsequent negotiations may be made in like manner. (§ 1327.)

§ 39. Transfer of receipts.—A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A non-negotiable receipt cannot be negotiated, and the endorsement of such a receipt gives the transferee no additional right. (§ 1328.)

§ 40. Who may negotiate a receipt.—A negotiable receipt may be negotiated—

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such entrusting the receipt is in such form that it may be negotiated by delivery. (§ 1329.)

§ 41. Rights of person to whom a receipt has been negotiated.—A person to whom a negotiable receipt has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. (§ 1330.)

§ 42. Rights of person to whom a receipt has been transferred.—A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferrer, the title to the goods, subject to the terms of any agreement with the transferrer.

If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the transferrer or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferrer, or by a notification to the warehouseman by the transferrer or a subsequent purchaser from the transferrer or a subsequent sale of the goods by the transferrer. (Id.)

§ 43. Transfer of negotiable receipt without endorsement.—Where a negotiable receipt is transferred for value by delivery, and the endorsement of the transferrer is essential for negotiation the transferee acquires a right against the transferrer to compel him to endorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the endorsement is actually made. (§ 1332.)

§ 44. Warranties on sale of receipt.—A person who for value negotiates or transfers a receipt by endorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants—

- (a) That the receipt is genuine,
- (b) That he has a legal right to negotiate or transfer it,
- (c) That he has knowledge of no fact which would impair the validity or worth of the receipt, and
- (d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby. (§ 1333.)

§ 45. Endorser not a guarantor.—The endorsement of a receipt shall not make the endorser liable for any failure on the part of the warehouseman or previous endorsers of the receipt to fulfill their respective obligations. (§ 1334.)

§ 46. No warranty implied from accepting payment of a debt.—A mortgagee, pledgee or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person shall not by so doing be deemed to represent or to warrant the gen-

uineness of such receipt or the quantity or quality of the goods therein described. (§ 1335.)

§ 47. When negotiation not impaired by fraud, mistake, or duress.—The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake or duress to entrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress. (§ 1335.)

§ 48. Subsequent negotiation.—Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. (§ 1337.)

§ 49. Negotiation defeats vendor's lien.—Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obligated to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. (§ 1338.)

PART IV.—CRIMINAL OFFENSES

§ 50. Issue of receipt for goods not received.—A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been

actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5,000, or by both; but if the punishment be by imprisonment for more than one year, it shall be in the penitentiary, and no other punishment shall be inflicted. (§ 1339.)

§ 51. **Issue of receipt containing false statement.**—A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. (§ 1340.)

§ 52. **Issue of duplicate receipts not so marked.**—A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "Duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in section thirteen hundred and three, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5,000, or by both; but if the punishment be by imprisonment for more than one year, it shall be in the penitentiary, and no other punishment shall be inflicted. (§ 1341.)

§ 53. **Issue of receipts for warehouseman's goods which do not state that fact.**—Where there are deposited with or held by a warehouseman goods of which he is the owner, either solely or jointly in common with others, such warehouseman, or any of his officers, agents, or servants who knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding one

year, or by a fine not exceeding \$1,000, or by both. (§ 1342.)

§ 54. Delivery of goods without obtaining negotiable receipt.—A warehouseman or any officer, agent or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in sections thirteen hundred and three and thirteen hundred and twenty-five, be found guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by fine not exceeding \$1,000 or by both. (§ 1343.)

§ 55. Negotiation of receipt for mortgaged goods.—Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding \$1,000, or by both. (§ 1344.)

PART V.—INTERPRETATION

§ 56. When rules of common law still applicable.—In any case not provided for in this chapter, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause shall govern. (§ 1345.)

§ 57. Interpretation shall give effect to purpose of uniformity.—This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it. (§ 1346.)

§ 58. Definitions.—(1) In this chapter, unless the context or subject matter otherwise requires—

“Action” includes counter claim, set-off, and suit in equity.

one "Delivery" means voluntary transfer of possession from person to another.

"Fungible goods" means goods for which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

"Goods" means chattels or merchandise in storage, or which has been or is about to be stored.

"Holder" of a receipt means a person who has both actual possession of such receipt and a right of property therein.

"Order" means an order by endorsement on the receipt.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"To purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Receipt" means a warehouse receipt.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

(2) A thing is done "in good faith" within the meaning of this chapter when it is in fact done honestly, whether it be done negligently or not. (§ 1847.)

WASTE AND UNAPPROPRIATED LANDS

For price of waste land, grant therefor, register's fees, etc., see Code, §§ 2504-9.

WATER AND WATER COURSES

See Easements; Real Estate

For statutes as to in general, see Code, §§ 3573-81. For obstruction of water courses, see Code, §§ 4746-56.

WEAPONS (DANGEROUS)

- § 1. Carrying concealed weapons; how punished; forfeiture of weapons; how disposed of
- § 2. Carrying dangerous weapon to place of religious worship, or on Sunday at place other than his own premises; how punished
- § 3. Prohibiting the selling or having in possession blackjacks, etc.
- § 4. Furnishing pistols, dirks, or bowie knives, or toy firearms, to minors
- § 5. When person going armed to give recognizance
- § 6. Dealers to have license
- § 7. Form of "description" in warrant or indictment

§ 1. **Carrying concealed weapons; how punished; forfeiture of weapons; how disposed of.**—By section 4534 of the Code: "If any person carry about his person hid from common observation, any pistol, dirk, bowie-knife, razor, slung-shot, metal knucks, or any weapon of like kind, he shall upon conviction thereof, be fined not less than \$20, nor more than \$100 and, in the discretion of the court, justice, police justice, or jury trying the case, may, in addition thereto, be committed to jail for not more than six months, and such pistol, dirk, bowie-knife, razor, slung-shot, metal-knucks, or any weapon of like kind, shall, by order of the court, justice or police justice be forfeited to the Commonwealth and may be seized by an officer as forfeited, and such as may be needed for police officers and conservators of the peace shall be devoted to that purpose, and the remainder shall be destroyed by the officer having them in charge; but this section shall not apply to any police officer, town or city sergeant, constable, sheriff, conservator of the peace, or to carriers of United States mail in the rural districts, or collecting officer while in the discharge of his official duty: provided, the circuit court of any county in term time, and any corporation court in term time, upon a written application and satisfactory proof of the good character and necessity of the applicant to carry concealed weapons, may grant such permission for one year. The order making same shall be entered in the law order book of such court."

Officers and guards of penitentiary may carry weapons. (Code, § 5040.)

§ 2. Carrying dangerous weapon to place of religious worship, or on Sunday at place other than his own premises; how punished.—By section 4578 of the Code: "If any person carry any gun, pistol, bowie-knife, dagger, or other dangerous weapon, to a place of worship while a meeting for religious purposes is being held at such place, or, without good and sufficient cause therefor, carry any such weapon on a Sunday at any place other than his own premises, he shall be fined not less than \$20. If any offense under this section be committed at a place of religious worship, the offender may be arrested on the order of a conservator of the peace; without warrant, and held until a warrant can be obtained, but not exceeding three hours. It shall be the duty of every justice, upon his own knowledge, or upon the affidavit of any person, that an offense under this section has been committed, to issue a warrant for the arrest of the offender."

§ 3. Prohibiting the selling or having in possession blackjacks, etc.—By section 4535 of the Code: "If any person sell or barter, or exhibit for sale or for barter, or give or furnish, or cause to be sold, bartered, given or furnished, or has in his possession, or under his control, with the intent of selling, bartering, giving or furnishing any blackjack, brass or metal knucks, or like weapons, such person shall be fined not less than \$25 nor more than \$100. The having in one's possession of any such weapon shall be *prima facie* evidence, except in the case of a conservator of the peace, of his intent to sell, barter, give or furnish the same."

§ 4. Furnishing pistols, dirks, or bowie knives, or toy firearms, to minors.—See *Minors*, section 15

§ 5. When person going armed to give recognizance.—See *Justice of the Peace*, div. VIII (as to "Peace and Good Behavior"), section 7.

§ 6. Dealers to have license.—See *Licenses and License Taxes*, section 64.

§ 7. Form of "description" in warrant or indictment.

NO. 1. CARRYING A CONCEALED WEAPON

(Code, §§ 4578, 4782.)

DESCRIPTION:

"did unlawfully carry about his person, hid from common observation, a certain pistol (or *dirk*, *bowie-knife*, *razor*, *slung-shot*, or other like weapon)."

No. 2. WARRANT ORDERING SALE OF FORFEITED CONCEALED WEAPON

(Idem.)

— county, to-wit:

To X. Y., sheriff of said county:

Whereas C. D. was this day duly convicted before me, J. T., a justice of said county, for this, that on the — day of —, 192—, in said county, the said C. D. [here describe the offense as in the warrant of arrest]; and whereas the said pistol (or other weapon) being seized by C. R. a constable of said county, was this day adjudged by me to be forfeited to the commonwealth:

These are therefore, in the name of the Commonwealth of Virginia, to command you, the said sheriff forthwith to take the said pistol, seized and forfeited as aforesaid, and the same to sell in due form of law, and the proceeds thereof to account for and pay this my warrant.

over to the circuit court of said county on the first day of the — term thereof; and make return to me how you have executed

Given under my hand and seal, this — day of — 192—.

J. T., J. P. (L. S.)

No. 3. WARRANT FOR CARRYING DANGEROUS WEAPONS TO CHURCH

(Code, § 4578.)

DESCRIPTION:

"did carry a gun (or *pistol*, *bowie-knife*, *dagger*, or other dangerous weapon) to a certain place of worship, to-wit: at church (or other place), in said county while a meeting for religious purposes was then being held at said church (or other place)."

See note under next form.

No. 4. WARRANT FOR CARRYING A DANGEROUS WEAPON OFF ONE'S PREMISES ON A SUNDAY

(Idem.)

DESCRIPTION:

"that day being a Sunday without good and sufficient cause for so doing, did carry a gun (or *pistol*, *bowie-knife*, *dagger*, or other dangerous weapon) at a place other than on his own premises, to-wit: at — [here state the place.]"

It should be observed that this warrant and the one preceding it are issued upon the justice's own knowledge, or else upon an affidavit—*i. e.*, an oath in writing.

WEIGHTS AND MEASURES

- § 1. Number of pounds to bushel in Virginia
- § 2. Other weights and measures
 - (1) Cord
 - (2) Apple barrel
 - (3) "Truck barrel
 - (4) Barrel of flour
 - (5) Coal to be weighed on request
- § 3. Miscellaneous provisions

§ 1. **Number of pounds to bushel in Virginia.**—By section 1470 of the Code, the following number of pounds constitute a bushel:

Alfalfa seed	60	Grass seed, timothy	45
Apples (dried)	28	Hair (plastering)	8
Apples (green)	45	Hemp seed	54
Barley	48	Lime (unslacked)	80
Beans, castor	46	Malt	38
Beans, navy	60	Millet seed	50
Beans, soja	60	Oats	32
Bran	20	Onions	57
Buckwheat	48	Parsnips	50
Carrots	50	Peaches, dried (peeled)	40
Coal, anthracite	80	Peaches, dried (unpeeled)	32
Chestnuts	57	Peanuts, Spanish	30
Corn in ear	70	Peanuts, Virginia	22
Corn (shelled)	56	Peas, black-eye	60
Corn meal	48	Peas, cow	60
Cotton seed	30	Potatoes, Irish	60
Flax seed	56	Potatoes, sweet	56
Grass seed, blue	64	Rye	56
Grass seed, clover	60	Salt	50
Grass seed, Hungarian	48	Tomatoes	60
Grass seed, orchard	14	Turnips	55
Grass seed, red top	40	Wheat	60

§ 2. **Other weights and measures.**—(1) *Cord.*—A cord is 8 feet long, 4 feet high, and 4 feet wide, or the equivalent thereof, being 128 cubic feet (Code, § 1470).

(2) *Apple barrel.*—A barrel of apples is 135 (a bushel 45) pounds, a barrel to be, head diameter, 17½ inches; length of stave 27½ inches bulge, not under 64 inches, outside meas-

urement. If smaller barrel used, it must be stamped on each head, "short barrel", in letters not under 2 inches in height. Apples packed in barrels for sale or offered for sale must have conspicuously displayed on the head: (a) Name and address of owner of apples at the time of packing; (b) minimum size of at least 90 per cent of apples therein; (c) if not hand-picked, they must be marked "windfalls". Provision is made for Dairy and Food Commissioner to appoint an inspector for fruit growers, to inspect the quality and grade of apples. For a violation, fine not over \$50, and for subsequent offense, not over \$100. (Code, § 1471, as amended by Acts 1920, p. 244.)

(3) *"Truck" barrel*.—A "truck" barrel is to be not under $27\frac{1}{2}$ inches long, and the head or heads not under $17\frac{1}{8}$ inches in diameter; if double headed, or used with wood or other rigid heads set inside the staves at both ends, it must be $18\frac{1}{2}$ inches across at the bilge, inside, and straight line inside distance between the heads, not under $24\frac{1}{2}$ inches; if single headed and used with top end open or covered with burlap or cotton goods or other flexible material, it must be not under $18\frac{1}{2}$ inches across at the top, inside the staves, and not under 19 inches across at the bilge, inside, and the straight line inside distance between the head in the bottom to top of staves, not under 26 inches. Other barrels of same cubical contents, are sufficient. For violation, fine \$1 to \$5. (Code, § 1472.)

(4) *Barrel of flour*.—A barrel of flour is 196 pounds, which must be stamped on one head, under penalty of a fine of \$25. (Code, § 1474.)

(5) *"Lime" barrel*.—Large barrel 280 pounds net; small barrel, 180 pounds net; and the weight and the name of manufacturer and where manufactured must be clearly marked on one or both heads; and where lime is sold in less quantity, the weight must be marked on the container, with the name of the manufacturer, and brand, if any. It is a misdemeanor to sell lime in containers not so marked. (Acts 1922, p. —.)

(6) *Sale of cement*.—A container of cement must be plainly marked with the name and address of the manufacturer and its weight. Failure to do so is a misdemeanor. (Acts 1922, p. —.)

(7) *Coal to be weighed on request.*—Where 500 pounds or more and there are public scales in a city or town, the dealer may be required to weigh the coal, the consumer to pay the fee, if the weight is correct; otherwise, the dealer, refusing to weigh, is fined \$5. (Code, § 1475.)

§ 3. *Miscellaneous provisions.*—See Code, § 1464-9, 1476-85.

WILLS

See Administrator and Executor; Advancements; Conditions in Conveyances and Wills; Conveyances; Descents and Distributions; Dower; Power of Appointment; Remainder; Reversion.

- § 1. Definitions
- § 2. Who may make a will
 - (1) Unsoundness of mind
 - (2) Minority
 - (3) Fraud, force, or undue influence
- § 3. Who may take under a will
- § 4. What property or estate may be willed
- § 5. Mode of making a will
 - (1) Will must be in writing
 - (2) Signing by the testator
 - (a) How he signs
 - (b) Signing or acknowledgment in witnesses' presence
 - (3) Witnesses to a will
 - (a) When required; number; no form of attestation necessary
 - (b) Who are competent witnesses
 - (c) Witnesses must be "present at same time"
 - (d) What is "in the presence of the testator"
- § 6. Revocation of a will
 - (1) Revocation by "subsequent will or codicil," etc.
 - (2) Revocation by "cutting, tearing, burning, obliterating, cancelling, or destroying"
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 - (4) Revocation by after-born children
 - (5) Revival of a revoked will
- § 7. What, if devisee or legatee die before testator
- § 8. Probate and recordation of a will
 - (1) What is meant by probating a will

- (2) Necessity for probate
- (3) Who may offer will for probate
- (4) What court or clerk may admit will to probate
- (5) When curator appointed
- (6) How will probated
 - (a) Ex parte proceedings, bill in equity
 - (b) Proceedings between the parties
 - (c) Proof
 - (d) Copy of probated foreign will probated here
- § 9. When an advancement satisfactory of a devise or bequest
- § 10. When homicide bars taking under will
- § 11. When and how benefits of will renounced, and effect thereof
- § 12. Construction of devise to person and his "children," "heirs," etc.
- § 13. Provision for payment of debts not to affect limitation
- § 14. Punishment for fraudulently destroying or concealing a will
- § 15. When loan of personal property over 5 years void, unless by will or deed, and recorded
- § 16. Effect of condition that devisee or legatee shall not contest will
- § 17. Conditions generally in a will or deed
- § 18. Effect of contract to devise land
- § 19. Legacies
 - (1) Different kinds
 - (a) Specific legacies
 - (b) Demonstrative legacies
 - (c) General legacies
 - (d) Vested legacies; contingent
 - (e) Conditional legacies
 - (f) Cumulative legacies
 - (2) Creditor-legatee and debtor-legatee
 - (a) Legacy to a creditor
 - (b) Legacy to a debtor
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 - (4) Description of legatees and legacies
 - (a) Description of legatees
 - (b) Description of legacies
 - (5) Effect of advancements upon a legacy
 - (6) Where subject of legacy is lost or destroyed, or afterwards disposed of
 - (7) When legacy given for valuable consideration preferred
 - (8) Payment of legacies
 - (a) In general
 - (b) Time of payment
 - (c) Person to whom legacy to be paid
 - (d) Interest on legacies
 - (9) Refunding legacies
 - (10) When legatee takes as trustee
- § 20. Various forms under "Will"

§ 1. **Definitions.**—A will is a writing made in due form of law of a person's last mind or will as to who shall take his estate, real and personal, after his death. A will of real estate is called "devise", and the one to whom it is "devised," or willed, is called "devisee"; while a will of personal property is called "legacy" or "bequest," and the one to whom it is "bequeathed," or willed, is called "legatee". A will is sometimes called "testament," and so the maker of a will is called testator (if a woman, "testatrix"). "Testamentary" refers to a will. One dying "testate" means leaving a will, and dying "intestate" means without leaving a will. Indeed, by section 5226, except where it would be inconsistent with the manifest intent of the legislature, the word "will" includes a testament, and a "codicil" (i. e., an addition to a will), an appointment by will or by writing in the nature of a will, in exercise of a power—see *Power of Appointment*; and also any other "testamentary disposition," or disposal of property by will.

§ 2. **Who may make a will.**—By sections 5227-8 of the Code, every person not prohibited by the following section not "of unsound mind, or under the age of 21 years, shall be capable of making a will, except that minors 18 years of age or upwards, may, by will, dispose of personal estate."

Any person may make a will except one of unsound mind, a minor under 21 (18 as to personal estate), or where the testator has been imposed upon by fraud, force, or undue influence.

(1) *Unsoundness of mind.*—Mere eccentricity, or peculiarity, however great, old age of itself, habitual drunkenness not amounting to settled derangement, or drunkenness at the time not producing a temporary loss of the reason and memory, or being deaf and dumb, or partial lunacy where the will is made at a lucid or sane interval or the hallucinations do not relate to the matter or persons of the will—does not incapacitate a person from making a will (101 Va. 507; 90 Va. 588; 849; 89 Va. 118; 85 Va. 546; 82 Va. 238; 78 Va. 592; 4 Grat. 106; 1 H. & M. 476; 4 Call, 423).

He is capable of making a will if at the time he is capable of knowing and understanding, (1) the nature of the business he is then engaged in; (2) the elements of which

the will is composed; and (3) the dispositions made therein, both as to the estate, the persons, and manner of distribution (85 Va. 555; 89 Va. 118; 90 Va. 849).

(2) *Minority*.—21 years as to real and 18 as to personal property, as the statute provides.

(3) *Fraud, force, or undue influence*.—These invalidate a will. "Undue influence," to avoid a will, must destroy the testator's freedom of purpose, substituting the will of others in its place; it must be exerted specifically upon the very act of making a will in favor of particular ones, and must mislead him to make a will contrary to his duty; but honest intercession, argument, and persuasion addressed to the testator's understanding, conscience, or affection, not controlling his will in opposition to his judgment or inclination, and not coupled with fraud or imposition, does not amount to undue influence, though urged beyond the bounds of strict propriety (107 Va. 131, 441; 106 Va. 564; 90 Va. 849; 82 Va. 834; 78 Va. 592; 29 Grat. 24; 27 Grat. 103; 23 Grat. 906; 11 Grat. 220; 9 Grat. 330). (2 M's Real Prop., §§ 1241-5.)

§ 3. Who may take under a will.—Any person (minor, lunatic, idiot), except an alien enemy (i. e., a foreigner of a country at or in a state of war with us), or a church (as to land); provided the persons and objects are not vague and uncertain; if they are they are void—see section 19, (4), below. For vague and indefinite charities, in general, and charitable, religious, and educational trusts, in particular, see *Trusts and Trustees*, sections 15 and 16, and *Church and Church Property*.

§ 4. What property or estate may be willed.—A person may by will, dispose of any estate, real or personal, or any right, or interest, present or future, he shall be entitled to at his death, and which would, if not willed, pass to his heirs, administrator, or next of kin. (Code, §§ 5227, 5417, 5142.)

A will is construed to speak and take effect as if it had been executed immediately before the testator's death, unless a contrary intention appear by the will. (Code, § 5236.)

A subsequent conveyance, of course, prevents the operation of a will to that extent. (Code, § 5235; 8 Leigh, 614.)

§ 5. Mode of making a will.—By section 5229 of the Code: "No will shall be valid unless it be in writing and

signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. If the will be wholly in the handwriting of the testator that fact shall be proved by at least two disinterested witnesses."

For execution of a power of appointment by will, see Code, § 5230, or title *Powers*. By section 5231, a soldier in actual military service, or a mariner or seaman at sea, may make a verbal will of personal property, called a "noncupative" will.

(1) *Will must be in writing*.—It may be in writing with ink or pencil, or in typewriting or print, on paper, parchment, linen, leather, stone, metal, or slate (anything moist, except snow or sand!), whether expressed at large or by mere notes. It need not be in one paper, but may be several of different dates, a part witnessed and a part in his own handwriting, eliminating only such part of an earlier paper as is clearly in conflict with the later (92 Va. 723).

The whole will must be in writing; but a trust may arise by a verbal promise, as, where a devisee promised to hold for another (94 Va. 580). See *Trusts and Trustees*.

A written paper may even be good as a will though not in the form of a will or without the testator's knowledge that he has made a will, as a writing in the form of a deed, letter, bond, note, etc., where not intended to take effect until after the maker's death, and actually representing his last will, provided the requirements of the statute have been met. (26 Grat. 480; 27 Grat. 319; 28 Grat. 44).

Nor does it matter that a more formal or a different disposition was intended; but the writing should have been intended as an actual disposition, to take effect at his death, and not a mere expression of what he intended or expected to do (2 Leigh 262; 1 Grat. 454, 478; 4 Grat. 277; 26 Grat. 480; 27 Grat. 319; 28 Grat. 44; 85 Va. 459).

A writing beginning, "In case of my death on this trip," etc., and disposing of his property, is a will, though he survived the trip (19 Grat. 758; 27 Grat. 313).

(2) *Signing by the testator.*—(a) *How he signs.*—The testator may sign by making a cross mark, accompanied by his name written by some one else; or, as the statute provides, his name may be signed by some one else, if signed in his presence and by his direction.

It must be signed, the statute says, "in such manner as to make it manifest that the name was intended as a signature"; therefore, in the absence of proof to that effect, his name at the commencement or in the body of the will is not sufficient; but where after making a complete and orderly disposition of his property, he concludes with the words, "I, W. D., say this is my last will and testament," it was held sufficient (13 Grat. 664; 16 Grat. 418; 84 Va. 362-3; 86 Va. 596; 102 Va. 467).

(b) *Signing or acknowledgment in witnesses' presence.*—The signature must be made or the will acknowledged by the testator in the presence of the witnesses, all of whom must be present at the same time. He may either sign in their absence and then acknowledge the will before them when they are present, or he may sign in their presence, without any acknowledgment. If he signs by mark or another signs for him by his direction, his acknowledgment of the act or will as his is sufficient (6 Grat. 25; 12 Grat. 239, 257-8).

(3) *Witnesses to a will.*—(a) *When required; number; no form of attestation necessary.*—If the will is wholly in the handwriting of the testator" (technically called a "holograph" will), no witnesses are required, but "that fact shall be proved by at least two disinterested witnesses"; if not wholly in his handwriting, the statute says "the signature shall be made, or the will acknowledged, by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe (i. e., sign) the will in the presence of the testator, but no form of attestation shall be necessary."

The statute requires two witnesses, but if there is any possibility of there being land in another state, it would be

safer to have three, as some states require three, and the state where the land is controls. The usual form of attestation is, "Signed and published by T. T., as and for his last will, in the presence of us, who in his presence and in the presence of each other, have hereunto subscribed our names as witnesses," with the signatures of the witnesses; but this attestation clause is not necessary, the statute saying "no form of attestation shall be necessary." It is not even necessary that the word "witnesses" be used, but they must sign at the end of the will (80 Va. 293).

To prove the will for probate, the subscribing or other witnesses (where they are dead, absent, insane, etc.) may be used, but it does not require two witnesses (2 Grat. 439, 460; 6 Grat. 64, 627; 29 Grat. 67; 30 Grat. 60).

(b) *Who are competent witnesses.*—Section 6208 of the Code says, "No person shall be incompetent to testify because of interest," and by sections 5244-5, creditors where the will charges an estate with debts, and an executor, are expressly made competent. The Revisors of Code 1919 have omitted the exceptions as to devisees and legatees of their consorts, and as to husband or wife of the testator. And, now also, under "General Provision as to Crimes," "conviction of felony (i. e., a capital or penitentiary offense) or perjury shall not render the convict incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit" (Code, § 4779).

Of course, persons deficient in understanding are incompetent.

(c) *Witnesses must be "present at same time."*—They must be present at the same time when the testator signs or acknowledges the will, and they must sign in his presence, but they need not sign in each other's presence—one may sign and go, and then the other.

(d) *What is "in the presence of the testator."*—The witness must sign in the testator's presence—within the range of his vision, as, in the same room, where he could see if he tried; if not in the same room, it is *prima facie* not in his presence, which however is repelled by showing he could see where he actually was; (90 Va. 850; 85 Va. 570; 81 Va. 405, 410, 413; 30 Grat. 56; 10 Grat. 67, 86, 106; 8 Grat. 307; 2 Grat. 439). (2 M's Real Prop., §§ 1251, 1254, 1263.)

§ 6. Revocation of a will.—It is provided by section 5233 of the the Code: "No will or codicil, or any part thereof, shall be revoked, unless under the preceding section (i. e., by marriage) or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, canceling, or destroying the same or the signature thereto, with the intent to revoke"; but as to children born after will is made, see (4), below.

Notwithstanding the statute (Code, § 5235), a valid conveyance of any of the same property of course revokes or annuls the effect of the will to that extent (89 Va. 264).

(1) *Revocation by "subsequent will or codicil, etc."*—Revocation is a question of intention, derived from the words when the revocation is in writing.

A subsequent will or codicil (i. e., addition to a will), or a writing declaring an intention to revoke executed like a will revokes a former will either where it expressly does so, or where it makes a different and conflicting disposition of the property. (2 M's Real Prop., § 1267.)

(2) *Revocation by "cutting, tearing, burning, obliterating, canceling, or destroying the will or signature."*—The statute says if the testator does this, or some one in his presence and by his direction does it, with the intent to revoke, the will is revoked. Any one of these acts, however slight, done with that intent, is sufficient; but mere words and directions to do so, however positive and pointed, will not suffice (3 H. & M., 502; 3 Leigh 32; 1 Rob. 346).

If there are duplicates, the testator retaining one, and his copy cannot be found after his death, it is presumed he destroyed it, and all are revoked (97 Va. 639; 1 Grat. 286); or, it seems, if he retains both, and cancels or destroys one, the other is presumed to be revoked, until the contrary is shown. (2 M's Real Prop., §§ 1266-9.)

(3) *Revocation by marriage.*—A will is revoked by the marriage of the testator, except a will made in exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her

heir, administrator or executor, or next of kin (Code, § 5232). The purpose of the revocation is to provide for the consort and family; but in the excepted case, if the appointment were revoked, the estate appointed would not go to them, and so, the design of the revocation failing, none takes place. (2 M's Real Prop., § 1271.)

(4) *Revocation by after-born children.*—There are two cases, (1) where there are no children at the date of the will, and (2) where there are children then and others are afterwards born; and there are two statutes: By section 5242 of the Code: "If any person die leaving a child, or his wife with child which shall be born alive, and leaving a will made when such person had no child living, wherein any child he might have is not provided for or mentioned, such will, except so far as it provides for the payment of the debts of the testator, shall be construed as if the devises and bequests therein had been limited to take effect, in the event that the child shall die under the age of twenty-one years, unmarried, and without issue."

In order that this statute may apply, the following circumstances are necessary: (1) There must be no child at the time the will is made; (2) a child must be born alive after the will is made; (3) the child may be born before or after the testator's death; (4) the will must not provide for any future child of his, nor must any possible child be mentioned therein. If such unprovided for child die in the testator's lifetime, leaving a child or children, the will, it seems, is still revoked.

By section 5243: "If a will be made when a testator has a child living, and a child be born afterwards, such after-born child, or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted (i. e., not provided for), shall succeed to each portion of the testator's estate as he would have been entitled to if the testator had died intestate (i. e., without will); towards raising which portion the devisees and legatees shall, out of what is devised and bequeathed to them, contribute ratably, either in kind or in money, as a court of equity, in the particular case, may deem most proper. But if any such after-born child, or de-

scendant, die under the age of twenty-one years, unmarried, and without issue (i. e., children), his portion of the estate, or so much thereof as may remain unexpended in his support and education, shall revert to the person to whom it was given by the will."

The following things are necessary to the application of this statute: (1) The testator must have a child or children living when he makes the will; (2) a child or children must afterwards be born to him; (3) such after-born child or children must be unprovided for by any settlement and must be neither provided for nor expressly excluded by the will, but only not provided for or "pretermitted" (as it is called), and any provision for a child which shows he has not been forgotten will prevent the application of the statute (101 Va. 537); (4) such child or children may, it seems, be born either before or after the testator's death; (5) if such child or children die before the will takes effect, a like provision applies to any descendant of such child; (6) such child or his descendant is to receive the same portion as if the testator had died without a will. (2 M's Real Prop., §§ 1272-4.)

(5) *Revival of a revoked will.*—By section 5234 of the Code: "No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown."

§ 7. What, if devisee or legatee die before testator?—By section 5238 of the Code: "If a devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will. This rule shall also apply to a devise or bequest to several jointly, one or more of whom die in the life time of the testator."

It is immaterial whether the party is dead at the testator's death or at the time the will is executed (94 Va. 517).

By section 5239: "Unless a contrary intention shall ap-

pear by the will, such real estate or interest therein as shall be comprised in any devise in such will, which shall fail or be void, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

§ 8. Probate and recordation of a will.—

(1) *What is meant by probating a will.*—To probate a will is proving by witness before the proper court or clerk, the testator's competency to make the will, the due execution thereof, and that it is his last will and testament, whereupon it is ordered to be recorded as and for his last will, and the original is deposited and preserved in the clerk's office. The court of probate has nothing to do with the construction of the will.

The judgment of the clerk that "the clerk doth admit the will to probate as and for the last will and testament" of the testatrix, decides not only that the will was duly executed, but all other questions necessary to the making of a valid will, which can be contested only by appeal within one year (123 Va. 219).

(2) *Necessity for probate.*—A will of chattels must always be admitted to probate, before the parties can claim under it, or it be recognized in any court. But as to lands, while probate of the will is not necessary to its validity, and it may be formally proved wherever it is desired to use it as evidence; yet as against a *bona fide* purchaser, without notice for valuable consideration, from the testator's heir, it is necessary that the will be recorded (which cannot be done until it is probated or proved in court or before the clerk), within one year after his death, or in case a devisee is a minor or insane, at the testator's death, then within one year from the removal of such disability (Code, § 5263). And provision is made in sections 5362 and 3393 (as amended by Acts 1920, p. 313) for the recordation of wills in every county or city where there is any estate real or personal, with the like effect as above as to notice to purchasers from heirs of land devised. But the tax must first be paid (Code, § 2403).

After probate, a copy of the will may be used as evidence wherever needed (Code, § 6197).

(3) *Who may offer will for probate.*—It may be done by the executor or any one interested (4 Grat. 106; 10 Grat. 358, 359); and by section 5250 of the Code, the court, on being informed that a person has in his custody the testator's will, may summon him, and by proper process compel him, to produce the same.

(4) *What court or clerk may admit will to probate.*—The circuit and corporation courts (Chancery court and Hastings Court Part II. of Richmond, and law and chancery courts of Norfolk and Roanoke—Code, §§ 5914, 5247, 5920, 5935, 5947) and the clerks of circuit courts, may admit wills to probate where the testator has a mansion (i. e. dwelling-house) or known place of residence; if neither, where any real estate lies; if none, where he dies or has personal estate (Code, §§ 5247, 5249).

Where a clerk admits the will to probate, an appeal of right lies to court, for any one interested, within one year (Code, § 5249).

The locality of stock of a corporation is where its chief office is and its shares are transferred; judgments, decrees, recognizances, and other debts of record, where the record is; bonds, mortgages, etc., where they are at the testator's death, and if not in the State, perhaps where the debtor resides; promissory and negotiable notes and foreign bills of exchange, and all other simple contract debts, where the debtor resides (2 Leigh 248, 719; 9 Leigh 119).

(5) *When curator appointed.*—In case of a contest about the will, or during the minority or absence of the executor, or until the executor or administrator qualifies and administration granted him, the court or clerk may appoint a curator of the estate, taking a bond in a reasonable penalty. He is to see that the estate is not wasted, collect the debts, and other personal estate, lease his lands, pay his debts (but not to affect their priority), may sue and be sued, and account to the executor or administrator, when he qualifies (Code, § 5248).

(6) *How will probated.*—The proceedings are either *ex parte* (on one side only), or *inter partes* (between the parties).

(a) *Ex parte proceedings; bill in equity.*—These are without summons or notice to any one, before the court or its

clerk, who may probate or reject the will; in the latter case, any person interested may within one year appeal of right to the court. After a sentence rejecting or order probating a will, a person interested who was not a party, may within two years file a bill in equity (with trial by jury), to impeach or establish the will, requiring production of all testamentary papers. If no bill is filed within the two years, the sentence or order is forever binding, with saving and protection to infants and non-residents (Code, §§ 5249, 5259-60). The record of what was proved or deposed on the motion to probate, and depositions of witnesses on such motion, who cannot be produced before the jury, may be admitted as evidence, to have such weight as the jury shall think it deserves (Code, § 5261).

Courts of equity have no inherent jurisdiction to set aside wills on the ground of fraud, undue influence, or lack of capacity to make a will. Jurisdiction is only under the statutes (123 Va. 219.)

(b) *Proceedings between the parties.*—A person offering a will for probate may have all persons interested summoned, and the issue, "Is it the testator's will or not?" is submitted to the court, or, if either party desire it, to a jury. The court may require all testamentary papers to be produced. The sentence or final order of the court is a bar to a bill in equity to impeach or establish the will (see (a), above), unless on some other ground of equity jurisdiction (Code, §§ 5253-8, 5260).

(c) *Proof.*—At least one of the subscribing witnesses to the will must be produced, or their absence accounted for; and if dead or out of the State or incompetent, their handwriting is proved by at least one witness. In the case of a will wholly in the testator's handwriting, his signature is proven and that the will is wholly in handwriting. If the subscribing witnesses or either of them is produced, it must appear that the will was executed in the form prescribed in the statute; if they have forgotten, but recognize their signatures, or if proof by other witnesses is had of their handwriting, or (in case of a holograph will) of that of the testator, it will be presumed the execution of the will was regular and legal, unless the contrary appear (3 Leigh, 436; 10

Leigh 13; 2 Grat. 460-1; 6 Grat. 25, 64; 12 Grat. 239, 257-8; 27 Grat. 106; 29 Grat. 67-68; 30 Grat. 60-61; 78 Va. 594).

Where the attesting witnesses reside out of the State, or are confined in another county or city under legal process, or are unable from sickness, age, or other infirmity, to attend before the court or clerk where the will is offered for probate, the same may be proved by their deposition, taken as in other cases, except no notice need be given, unless the probate is opposed by some one who has made himself a party (Code, § 5252).

(d) *Copy of probated foreign will probated here.*—This may be done from an authenticated copy of the will and the certificate of probate, provided it appears, in the case of lands, the will would be good here (Code, § 5251).

§ 9. **When an advancement satisfaction of a devise or bequest.**—See *Advancement*.

§ 10. **When homicide bars taking under will.**—A person cannot acquire by descent or distribution, or by will, an interest in the estate of another whom he has killed in order to obtain such interest (Code, § 5274).

§ 11. **Where and how benefits of will renounced, and effect thereof.**—As to personal property, see *Descents and Distributions*, section 12, and as to real estate, see *Dower*, section 5, (2), (c).

§ 12. **Construction of devise to person and his "children," "heirs," etc.**—See *Remainder*, section 3.

§ 13. **Provision for payment of debts not to affect limitation.**—No provision in a will of real estate, subject to payment of debts, or charging same therewith, shall prevent the operation of the statute of limitations, unless that plainly appear to be the testator's intent (Code, § 5814).

§ 14. **Punishment for fraudulently destroying or concealing a will.**—Fraudulently to destroy or conceal a will or codicil (i. e., an addition thereto), with intent to prevent the probate thereof, is punishable by penitentiary 2 to 5 years (Code, § 4458).

§ 15. **When loan of personal property over 5 years void, unless by will or deed, and recorded.**—See *Conveyances*, section 18.

§ 16. **Effect of condition that devisee or legatee shall**

not contest will.—If the will provides, in such case, the devise or legacy is to be given over to another, the estate is forfeited in case he contests; but otherwise, if the estate is not given over to another. (94 Va. 557; 2 M's Real Prop., § 1282.)

§ 17. **Conditions generally in a will or deed.**—See *Conditions in Deed or Will*.

§ 18. **Effect of contract to devise land.**—A court of equity will enforce such a contract by compelling a conveyance, on the ground that the property is charged with a trust in the hands of an heir, devisee, or purchaser with notice (98 Va. 515; 90 Va. 730).

§ 19. **Legacies.**—A legacy is a gift of personal property by will.

(1) *Different Kinds.*—In respect to the nature of the gifts, legacies are specific, demonstrative, and general; and in respect to their taking effect, they are vested, conditional, and cumulative.

(a) *Specific legacies.*—These are of specific things, and are not taken for debts until after the general legacies are exhausted.

(b) *Demonstrative legacies.*—These are of money to be paid out of an indicated fund, and are not taken for debts until after the general legacies are exhausted.

(c) *General legacies.*—These are sometimes called pecuniary legacies, and are of money, or of chattels which may be satisfied by the delivery of anything of that kind; as, "a riding horse," while "my riding horse" would be specific; or \$1,000, while "\$1,000 owing me by A" is demonstrative.

(d) *Vested legacies; contingent.*—This is where the legatee's legacy is so fixed as to pass upon his death to his administrator or executor; if it will not thus pass, it is contingent.

If the legatee dies before the testator and leave no children who survive the testator, the legacy "lapses," or is lost; but otherwise, if children survive, and this is true of a legacy to several jointly, one or more of whom die in the testator's lifetime (Code, § 5238).

While a legacy is payable one year after the qualification of the administrator (Code, § 5437); yet the legacy

vests immediately upon the testator's death, and though the legatee die during the year, it passes to his administrator or executor. But where the will fixes a future time for its payment, the legacy is vested or contingent, according as the testator meant to annex time to the payment or to the gift. If the legacy is expressed "to be payable" or "to be paid" at 21, or any other certain time, it vests at once upon the testator's death; if these words be omitted, and the legacy is given "at 21," or "if" or "in case," or "when," or "provided" the legatee attains the age of 21, or any other certain period, or "if," etc., any other certain event takes place, then time is considered as annexed to the gift, and the legacy is contingent, and if the legatee dies before the time fixed for its payment, it does not pass to his administrator or executor. Of course, the above rule is controlled by the testator's intention as gathered from the whole will; and the rule does not apply where the future period may never arrive, as, where the legacy is payable at the marriage of someone; neither does the rule apply where the legacy is charged on real estate, in which case it does not vest until the time of payment, and so is contingent, unless indeed a clearly manifest intention to the contrary may be gathered from the will and surrounding circumstances.

(e) *Conditional legacies*.—A conditional legacy is one that takes effect or is defeated upon the happening or not happening of some designated event, of which a contingent legacy, or one depending upon the legatee's being alive at a particular time, is one class. The condition may be created by any words importing it.

A condition is precedent when the act is to be done, or the event to happen, is to precede the vesting of the legacy, and subsequent when the act to be done, or the event to happen, is to follow the vesting; the former need only be substantially, while the latter must be rigorously, observed.

As to impossible conditions, if a legacy dependent upon a condition precedent, is charged only on real estate, the condition must be first performed before the legacy can take effect, and if the condition be impossible, the gift is void; though otherwise where the legacy is charged on personal estate alone, unless where the impossibility was unknown to the testator, or arises subsequently from an act of God.

Where an impossible subsequent condition is annexed to a legacy, the legacy is absolute whether charged on personal or real estate.

As to illegal conditions, where the consideration is precedent and evil in itself, the legacy is void, as it is now expressly declared in the case of murder (Code, § 5274), whether it be charged on personal or real property; but where the condition is merely against the policy of the law, as, that a married woman should live away from her husband, if charged on personalty it is valid, though otherwise if charged on real estate. And so a legacy charged on personal estate is valid where the precedent condition imposes a religious qualification, as, continued membership of some religious sect.

Illegal subsequent conditions are void, and the bequests conditioned thereon are valid.

For further as to conditional legacies see *Conditions in Wills and Conveyances*.

(f) *Cumulative legacies*.—This is where two legacies are given by the same testator to the same person, as contradistinguished from such as are merely repeated. Where two legacies under the same will are of equal amount or the same thing is given twice, it is merely repetition; but if in the former case, they are of unequal amount, the one last given is cumulative, and the legatee is entitled to both; and so where two legacies, whether of equal or unequal amount, are given by different instruments, as, by a will and a codicil, the last is cumulative; and in these cases other evidence than the will may be used to prove the testator's intention. (8 Min. Inst. 588-98.)

(2) *Creditor-legatee and debtor-legatee*.—(a) *Legacy to a creditor*.—In general, a legacy to a creditor, equal to or greater than the debt, in the absence of a contrary intention, (which the courts readily infer), is construed to be a satisfaction of the debt; but otherwise, where the debt was contracted after the will was made; or where the balance due is not ascertained or the legacy is less than the debt, or the debt is evidenced by a negotiable note or bill of exchange, or the legacy given is contingent and uncertain (as, of the residuum), or is only a life interest in the fund, or is not payable as soon as the debt is due, or differs from the debt

in its nature (as, where the legacy is an interest in land or a specific chattel), or where the will expressly directs all debts and legacies to be paid. The above rule applies to parent and child or husband and wife, as to other persons.

Other evidence than the will may be used to show that the testator did or did not design a satisfaction of the debt.

The law is stricter in respect to a portion which the parent has by marriage settlement obliged himself to provide for his children born of the marriage. In such a case, a legacy is a satisfaction of the portion to the extent of the legacy, though the legacy be less in amount, or be payable at a different time; but not if the legacy be subject to a condition as a contingency not applicable to the portion, nor if it be of a different class, or given expressly, or plainly with a different purpose. But in all cases the legacy is a satisfaction where there is a deficiency of assets.

The above rule as to portions is extended by statute (Code, § 5237), not only as between parent and child, but to everybody, it providing that, "A provision for or advancement to any person shall be deemed a satisfaction in whole or in part of a devise or bequest to such person, contained in a previous will; if it would be deemed in case the devisee or legatee were the child of the testator; and whether he be a child or not, it shall be so deemed in all cases in which it shall appear from parol or other evidence to have been so intended."

(b) *Legacy to a debtor*.—Where a legacy is bequeathed to a debtor, the executor may retain the debt out of the legacy, unless the contrary intention appear from the will or other evidence. Where the debt is bequeathed to the debtor it is a mere legacy, and is, therefore, still assets subject to the payment of the testator's debts. (3 Min. Inst., 598-9.)

(3) *Creditor-executor and debtor-executor*.—An executor may retain his debt out of the assets in preference to any other creditor of the same class; but if he part with the assets without doing so, he is without remedy at least at law, except he may recover of the heir or devisee, as all debts are a charge on the lands (see Code, § 5395).

As to a debtor-executor, it is provided that "the appointment of a debtor as executor shall not extinguish the debt" (Code, § 5377).

(4) *Description of legatees and legacies.*—

(a) *Description of legatees or devisees.*—A legatee or devisee must be distinctly designated by name or by description, and the purpose or object must not be uncertain nor indefinite—see *Trusts and Trustees*, section 16.

For the rule where legatees or devisees are designated, not by name, but by classes, as, “children,” “grandchildren,” “descendants,” “nephews and nieces,” “representatives,” “personal representatives,” “next of kin,” “family,” “servants,” etc.; as to which the general rule is (where the gift is not by way of remainder—see *Remainder*, section 3), those only are entitled to share who answer the description at the testator’s death, unless the period of distribution, etc., is postponed, and then at that period, unless the context of the will shows a different intention. If the gift is by way of remainder to children and in a class, all living at the testator’s death take vested interests immediately on his death, and all coming into being or existence before the particular estates end likewise take a vested interest immediately and their representatives will take as if they had been in being at the testator’s death.

Mistake as to the name, when explained by the will, will not vitiate the legacy—thus: “Thomas, the second son of my brother”, the second son being William, and there is no Thomas; or “Henry, the legitimate son of Betsy T.”, Henry being illegitimate; or “my brother’s daughter, Cornelia T.”, the only daughter being Caroline. The rule in all these cases is to reject so much of the description as is false, and, if a sufficient description remains to identify the person intended, and ascertain the application of the bequest or devise, it is good.

Where the ambiguity is latent, or not apparent on the face of the will, other evidence may be used. (3 Min. Inst., 585-8.)

(b) *Description of legacies.*—The subject-matter must be ascertainable from the description in the will, though a mistake in the description is not necessarily fatal, if, after rejecting what is inaccurate, enough remains to designate the subject; as, a bequest of “my white horse,” he having but one, a black horse, the latter passes.

The terms "goods", "chattels", "effects", used without qualification, embraces all the personal estate of the testator, such as bonds, notes, money, furniture, etc. But where those terms are qualified by annexing a place, as, "my goods at A.," the meaning is restricted to such effects as are susceptible of a fixed locality, and are at that place; hence, while plate, linen, books, horses, bank notes, and negotiable notes and bills of exchange in a negotiable state so as to be transferred by mere delivery at the place designated, will pass under such a bequest, yet bonds, promissory note, and other writings not negotiable, and not endowed with the attribute of locality, do not pass under it.

"Household goods" includes all articles of household use not consumed in the enjoyment, provided the testator procured them for his house and used them in it for his comfort and accommodation; but goods of a household nature kept in the way of trade or business, as, in a store, do not pass by that description. General words, such as "goods" and "chattels", if coupled with other words of "limited signification", are restricted to things of the same kind as those named, although an express exception may impart to the words their full comprehensiveness of meaning.

A bequest of "stocks on a farm" includes not only all movable property on the farm, but also it is said, the growing crops—but see *Landlord and Tenant*, section 5, (10); but the gift of stock, plantation utensils, and household furniture belonging to the place, does not comprise fattening hogs, a still, or a set of smith's tools.

A legacy of money in the testator's house, passes bank notes and ready money alone, and not mortgages, bonds, notes, and other securities for money; though "all the money" or "the money in hand" passes a balance at a bank or a savings bank. And so "whatsoever debts may be due me at my death", passes a bill of exchange and a balance at a bank.

If stock be specifically bequeathed to a child for whom no support is provided, the profits will pass likewise, unless otherwise disposed of.

Parol (or oral) evidence is never admitted to show the views and opinions under which the testator acted in making his will. (3 Min. Inst., 606-9.)

(5) *Effect of advancements upon a legacy.*—See *Advancements*.

(6) *Where subject of legacy is lost or destroyed or afterwards disposed of.*—The legacy, in these cases, fails, as also where the form is essentially changed, as, where cloth is made into a garment or a chain into a cup, but otherwise where merely changed in name and form only, but substantially the same. To mortgage or otherwise to impose a lien on the subject does not defeat the legacy, the legatee taking subject to the lien, which is to be discharged from the general assets. If the testator disposes of the property and afterwards acquires other of the same description, the latter passes (see Code, § 5236). (3 Min. Inst. 611.)

(7) *When legacy given for valuable consideration preferred.*—Where a legacy is moved by a valuable consideration, as, a debt owing to the legatee, or the relinquishment of any right (as, of dower), or the like, it has preference over other general legacies, even beyond the value of the consideration. (3 Min. Inst., 613.)

(8) *Payment of legacies.*—(a) *In general.*—A bequest, whether specific, demonstrative, or general (see (1), above) vests only an inchoate property (a title begun but not complete) in the legatee. The legatee has not a complete right or title until the testator's debts are paid, for a man must be just, before he is generous. Upon the executor, as trustee for both purposes, all the testator's personal property is devolved, to be applied first to debts and then to legacies; if he leaves any debt unpaid, he is personally liable, to the extent he has paid out the deficiency in legacies. Under the statute (Code, §§ 5437-8), however, he is liable only when he pays the legacy within 12 months after his qualification or pays it afterwards with notice of the debt, or without taking from the legatee a refunding bond—see *Administrators and Executors*, section 8, (7).

So no legacy is complete without the executor's assent. Without such assent, it is not lawful for a legatee to appropriate the thing bequeathed, though it be already in his possession and the assets are in fact sufficient to pay the debts, nor though the testator so desired. The assent may be express, or implied from acts done or permitted by the executor, and is

readily inferred. Assent may be from the time which has elapsed since the debts were paid, or acquiescence in the legatee's possession of the legacy. On the other hand presumption of assent may be repelled by circumstances which render it improbable.

As to the effect of assent, it relates back to the death of the testator, thus giving the legatee the advantage of benefits accruing meantime and confirming transfers made by him. It vests the property absolutely in the legatee, who may then, if the assent is express and a refunding bond (Code, § 5438) is waived, bring an action to recover it from the executor, and after assent, the property is no longer liable to execution for the testator's debts; but the creditor may in a court of equity pursue the assets in the hands of legatees, if required for the payment of debts. (3 Min. Inst., 614-17.)

(b) *Time of payment.*—See *Administrators and Executors*, section 8, (7).

(c) *Person to whom legacy to be paid.*—As to minors, unless directed by the will to be paid to some particular person for a minor, a legacy must be paid to the minor's guardian duly appointed and qualified—see *Guardian and Ward*. A legacy to A., “to be equally divided between himself and his family,” or “for the use of him and his children,” may be paid to A.

As to insane persons or idiots, legacies must be paid to their committees (Code, § 1050, as amended by Acts 1920, p. 376).

(d) *Interest on legacies.*—As to specific legacies, profits on them are payable from the testator's death. General legacies bear interest from the time they are due, though not then payable. But if charged on lands yielding rents and profits, and no time of payment is named, interest accrues from the testator's death.

Where a general legacy is by a parent to a minor child, for whose support no provision is made, interest is allowed from the testator's death.

If a legacy is not claimed, it should be invested or paid into court, for if he omits to do this he must pay interest thereon.

Interest must also be paid on an annuity given as a legacy.

The interest is 6 per cent.—see *Interest and Usury*. Compound interest is allowed where the will expressly so directs, or directs that the fund shall be laid out to accumulate, or where the executor is entrusted to manage it for the legatee until his majority, he being a *quasi* guardian and chargeable with interest on annual balances—see *Guardian and Ward*. Compound interest is also charged when the executor has traded with the funds and refuses to disclose what he has made. See *Administrators and Executors*, section 8, (10). (3 Min. Inst., 620-3.)

(9) *Refunding legacies*.—Where debts are left unpaid, the creditor may pursue the assets in the hands of the legatee, although (at common law or in the absence of a refunding bond), the executor paying the debt stands in the creditor's place, and may compel the legatee to refund whenever the assets were originally deficient, or become so without his default. Where legacies are left unpaid, a legatee has recourse primarily to the executor, and only to the overpaid legatee when the executor and his sureties prove insolvent, and the assets were originally deficient, the payment of one legacy being *prima facie* evidence of their sufficiency to pay all. The executor can have recourse to the overpaid legatee only where the payment is by compulsion, and not when he has made it voluntarily. The legatees paid are liable only *pro rata*. As to debts (but not legacies), these principles are modified where refunding bonds are given (Code, §§ 5437-9; 31 Grat. 601). (3 Min. Inst. 624-5.)

(10) *When legatee takes as trustee*.—See *Trusts and Trustees*, section 3.

§ 20. Various forms under "Will."—

NO. 1. BRIEF FORM OF A WILL

(Code, §5229.)

In the name of God, Amen: I, S. N., of —, do make this my last will and testament, as follows:

1. I give and bequeath unto my daughter, E. [here describe the legacy to her].
2. I give and devise unto my son, S. N., Jr. [here describe the land devised to him, inserting any condition desired].
3. I give, bequeath, and devise unto my beloved wife, I. M. [here describe the land and legacy given to her, inserting any condition desired].

4. I appoint my said wife, I. M., guardian, during their respective minorities, of such of my children as, at the time of my death, shall be under the age of twenty-one years; and I desire that no security shall be required of her as such guardian.

5. I appoint my said wife, I. M., executor of this my will, and desire that no security be required of her as such.

6. I hereby revoke all previous wills and codicils heretofore made by me. Witness my hand, this ——— day of ———, 192—. S. N.

Signed, published and acknowledged by S. N., as and for his last will, in the presence of us, who, in his presence, have hereto subscribed our names as witnesses.

A. P.

B. C.

If the will is holograph—i. e., written wholly by the testator himself—no attesting witnesses are necessary; otherwise, at least two witnesses are required; and if the testator's name be signed by another, it must be done in the testator's presence, and by his direction; and while no form of attestation is necessary, the use of the above form is the safer practice.

No. 2. MORE COMPREHENSIVE FORM OF WILL

(4 Min. Inst. 1612; Sands' Forms, 259; Tate's Forms, 254.)

In the name of God, Amen. I, T. T., of ———, do make this, my last will and testament, as follows:

I direct that my body be decently buried, in a manner corresponding to my estate and situation in life, but with as little expense as may be consistent therewith.

And as to such worldly estate as I may die seized or possessed of, I dispose of the same as follows:

1. First, I give all my real estate whatsoever, situate and being in ———, with the appurtenances thereto belonging, unto my dear wife, J. T., for and during her life; and I give her also as her own forever, all the rents which shall be due and owing to me at my death for the said real estate; I also give her in fee-simple all my household goods and furniture, plate, china-ware, household linen, books, paintings and prints, together with all the utensils of every sort, and all the provisions and supplies of all kinds, in or belonging to my house in ———, where I now reside.

2. Secondly, from and after the decease of my said wife, I give and devise the said real estate to my eldest son, W. T., and his heirs forever.

3. Thirdly, I give and devise all that tract or parcel of land lying in the county of———, which I purchased from S. S., unto my son, H. T., and his heirs forever; and I also give to my said son, H. T., all the rents which, may be due and owing to me at my decease, for or issuing out of the same.

4. Fourthly, I give and bequeath unto my daughter, C. T., and my son, R. T., both minors, the sum of ——— dollars each, to be paid

them respectively, upon their attaining severally the age of twenty-one years; the same to be immediately, upon my death, invested securely, and the profits employed in the proper maintenance and education of my said two children respectively, and the surplus, if any, remaining from year to year, to accumulate for their benefit severally, and to be also securely invested, and the proceeds employed and disposed of in like manner.

5. Fifthly, and as to all the residue of my estate, real and personal, which shall remain after the payment of the expenses of my funeral and my debts, and after satisfying and liquidating the devises and legacies aforesaid, I give, devise and bequeath the same to my said son, W. T., and his heirs forever.

6. Sixthly, I appoint my wife, J. T., guardian, during their respective minorities, of such of my children as, at the time of my death, shall be under the age of twenty-one years; and I desire that no security shall be required of her as such guardian.

7. Seventhly, I appoint my said wife, J. T., executrix of this my will, and desire that no security shall be required of her as such.

8. Eighthly, I hereby revoke all previous wills and codicils hitherto made by me.

Witness my hand, this —— day of ——, in the year of our Lord 192—.

T. T.

Signed and published by T. T., as and for his last will, in the presence of us, who in his presence, have hereunto subscribed our names as witnesses.

E. E.

W. W.

NO. 3. WILL WITH MORE COMPLEX PROVISIONS

(4 Min. Inst. 1613; Tate's Forms, 249.)

In the name of God, Amen. I, T. T., of ——, do make this, my last will and testament, as follows:

1. First, I desire that my body may be decently buried, without needless expense, in a manner corresponding to my estate and my situation in life.

2. Secondly, I direct that all my just debts be paid as soon after my decease as conveniently may be, and to that end charge my whole estate, real and personal, with the same.

3. Thirdly, I give to my dear wife, J. T., in testimony of my affection for her, the sum of —— dollars in gold, as her own absolutely, and to be preferred to any of the devises and legacies hereinafter contained.

I do also give and bequeath to her, for her own absolute use, and do charge my whole estate, real and personal, except that which is disposed of by the fourth clause of this my will, with the payment thereof, the clear annual sum of —— dollars, in gold, to be paid to her or her assigns, by half-yearly payments, during each and every year of her natural life that she may continue my widow, but no longer; the first payment thereof to be made six months after my decease.

I do also give and bequeath to her, as her own absolutely, all my household goods and furniture, plate, china-ware, household linen, books, paintings and prints, together with all the utensils of every sort, and all the provisions and supplies of all kinds, in or belonging to my house in ———, where I now reside, or where I shall reside at the time of my death.

I do also give to my said wife full and competent authority and power, provided she shall continue and die my widow, by her last will in writing, duly executed as a will, to dispose and appoint the payment of the aforesaid annuity of ——— dollars, or any part thereof, to such person or persons as she shall think fit, for any term or terms not exceeding ——— years from the date of her decease.

4. Fourthly, I give, devise and bequeath to my executors, hereinafter named, their heirs and assigns, all my lands, tenements and messuages situate and being in ——— and ——— with the appurtenances thereto belonging or appertaining, together with all the fixtures, live and dead stock, carriage horses, horses, mules, oxen, cattle, furniture, agricultural and other implements of all kinds, commonly used therewith, saving what may have been already hereinbefore given to my said wife; to hold to my said executors, and their heirs and assigns forever; but, upon trust nevertheless that they shall and will, with all convenient speed, either by private contract or public auction, in such manner as they shall be best advised, proceed to sell the same for the most money that can be gotten therefor, and to convey, release, confirm, assure and assign the same to the best purchaser, when and so soon as the whole purchase money is paid, and not before, by such deeds and writings as they shall be advised by legal counsel; and then as to the moneys arising from such sale, upon trust that they shall apply the same in manner following: that is to say, that they shall invest the said moneys in some secure and interest-bearing stock or stocks, taking care in their investments to regard safety as an indispensable element and condition, and to that end selecting those stocks which do not hold out the promise of more than a moderate profit, and to hold such stock or stocks, with all interest, dividends and profits to accrue thereon, for and upon the several uses and purposes hereinafter expressed; that is to say, upon trust to pay the said interest, dividends and profits arising from such investments, as and when they shall be received, to and for the sole and separate use of my daughter, D. D. (who intermarried with H. D.), and her assigns, and not to be subject to her husband's debts or control, for and during the term of her natural life.

And from and after her death, upon trust, to pay the interest, dividends and profits aforesaid, to the said H. D., for and during the term of his natural life.

And from and after the decease of the survivor of the said D. D. and H. D., without leaving any issue of my said daughter, D. D., by her said husband, or leaving any such, in case they all happen to die before attaining the age of twenty-one years, being sons, or being daughters, the said age or previous marriage, with such consent as

after mentioned. Then upon trust to assign and transfer all the said capital stock or stocks to be purchased as aforesaid, and all interest, dividends and profits thereon to accrue and to become payable, to the account of the residue of my estate hereinafter disposed of.

But in case the said D. D. and H. D., his wife, shall die, leaving any such child or children, who shall live to the age of twenty-one years, being a son or sons, or being a daughter or daughters, their said age or previous day of marriage, with the consent of their said father and mother, or the survivor of them respectively, then from and after the decease of the said D. D. and H. D., his wife, upon trust, to assign the said capital stock so to be purchased as aforesaid, and all interest, dividends and profits thereon to accrue, and to become due and payable from thenceforth, to and amongst all such child or children, at and when they shall respectively attain such age, being sons, or being daughters, their said age or previous marriage, with such consent as aforesaid, his, her or their heirs forever, in equal shares and proportions. And in the meantime, until they shall respectively attain such age or previous marriage, in trust, to apply the interest, dividends and profits thereof, in and towards their respective maintenance and education, share and share alike.

And in case any or either of such child or children shall happen to die during his or their minority, being a son or sons, or being a daughter or daughters, during her or their minority, or previous marriage during such minority, with such consent as aforesaid, then upon trust, to pay, assign and transfer the whole of the share or proportion, or shares and proportions, of the said stock or stocks, and all dividends, interest and profits thenceforth to accrue and become payable thereon, of and belonging to such child or children so dying, to and for the use of the survivor or survivors of them, in equal shares and proportions, if more than one, and if but one, then the whole to and for the use and benefit of such child, his, her, or their heirs forever, and when his, her or their own share or shares thereof shall become payable and transferable.

And in case all such child or children shall happen to die before attaining such age or previous marriage, with such consent as aforesaid, then from and immediately after the decease of the longest liver of them, and after the decease of the said H. D. and D. D., his wife, and the survivor of them, in trust, to transfer and assign the said capital stock or stocks so to be purchased, with all or any accumulations thereof, and all interest, dividends and profits thenceforth to accrue and become payable thereon, to the account of the residue of my estate hereinafter disposed of.

5. Fifthly, I give and bequeath to my sister, V. S., the sum of ——— dollars, in gold, to be charged upon and issue out of the residue of my personal estate, and not out of my real estate, or any part thereof.

6. Sixthly, as to all the rest and residue of my estate, as well as real and personal, wheresoever situate and being, and of whatsoever nature or kind, and not hereinbefore given, bequeathed and devised, I do hereby give, devise and bequeath the same, and every part thereof,

subject to the payment of my funeral expenses, just debts and charges of proving and carrying into effect this my will, and to the payment of the annuities and legacies hereinbefore charged on my estate, or any part thereof, unto my two sons, A. T. and J. T., and their heirs forever, in equal shares and proportions.

7. Seventhly, I do appoint E. E. and F. F. to be executor of this my last will and testament, and I direct that they shall neither of them be required to give any security for the faithful execution thereof.

8. Eighthly, I hereby revoke all other and former wills or codicils, by me at any time heretofore made.

Witness my hand, which I have set to this my will, written upon _____ sheets of paper, signing every sheet thereof, this _____ day of _____, in the year 192—. T. T.

Signed, published and declared by T. T., as and for his last will, in the presence of us, who in his presence, at his request, have hereunto subscribed our names as witness.

R. R.
W. W.

No. 4. WILL WITH SUNDRY LIMITATIONS
(4 Min. Inst. 1616, Davis' Criminal Law, 643.)

I, T. T., considering the uncertainty of life (or *being sick and weak in body, but of sound and disposing mind*), do make this my last will and testament, hereby revoking all former wills by me at any time made.

1. I direct that all my just debts shall be paid; and if the debts due me, and the proceeds of the sale of my perishable property be insufficient for that purpose, my executors are authorized to sell so much of my other estate, real and personal, as may be necessary.

2. I give and devise to my wife, J. T., my mansion-house in the _____ of _____, with all the plate and household furniture and goods of every description therein, together with the tract of land annexed thereto [which, if the extent be at all uncertain, should be so described as to ascertain how much is included in the devise]; and all the horses, mules, oxen, cattle, and stock of every kind; carriages, wagons, carts, agricultural and other implements, and goods of all kinds used upon the said land; growing crops, and provisions of all sorts laid in for family consumption; to have and to hold the same in fee-simple (or *to have and to hold the same, except the growing crops and provisions, which I give to her in absolute property for and during her life, or so long as she remains my widow*). And do hereby declare that this, and subsequent provisions made herein for my wife, shall be in lieu of her dower and distributive share in my estate.

3. I give and devise to my son R., in fee simple, my tract of land in _____ county, commonly known by the name of _____, including not only the tract originally so called, but the lands adjoining, purchased by me of _____, and since occupied, together with

the said tract, as one estate, and stock of every kind, and goods of all kinds, and growings within two years from my death, the sum of ——— dollar. And on his failure of the said land, stock, and goods, the other moiety thereof to my son J., on the expiration of the said term, to be paid in simple.

4. I give and devise my land in ——— county, upon which my son should die without law issue), in that event I devise the same to his heirs, forever.

5. I give and devise my land to my daughter, M. L., and to the survivor of them, my tract of land by the name of ———, with stock of every kind, agricultural chattels of all sorts, and I trust that he shall, during the term of the said land, and take from the said land and the taxes and levies thereon, the expenses attending the same, deducting such payments, and such modes and proportions due of the said costs and for separate use, free from the death of the said H. L. I give and devise to her, in fee simple, the said land and chattels. But if my said daughter should die, in that case, I direct that the tract of land and personal property of the said H. L., during the term, and managed it for the said H. L., I give and devise the said land and chattels aforesaid, to the death, and the descendants of the said H. L. And I hereby include in the said dispositions and limitations, my interest and share my said daughter, in the eighth clause of this will.

6. I give and devise to my son, J., my tract of land in ———, with all the horses, cultural and other implements thereon, at the time of my death, when either of them shall

marry. And in the meantime, I direct that the profits thereof, or so much thereof as may be necessary, shall be equally applied by their guardian to their maintenance and education, the annual surplus, if any, to accumulate for their joint benefit. I also give to them — shares of stock held by me in the —; the profits of which I direct shall be appropriated in like manner.

7. I give and devise to my executors my lot on — street, in the city of —, known in the plan of said city as lot number —, to be sold by them when, in their opinion, it can be most advantageously done, and on such terms as they shall think most expedient; the proceeds whereof I desire that they shall lend out on good real security, or invest in safe interest paying stocks, at their discretion. One-third of the annual interest or profits thus accruing, and of the rent of the said house and lot until the sale thereof, I give to my said wife, J. T., during her life (or *so long as she remains my widow*), and the remaining two-thirds I direct to be annually paid by my executors to the guardian of my son P., until he arrives to the age of twenty-one years, to be applied to his support and education; and on his arriving at such age, I give to him in fee simple two-thirds of the proceeds of the said house and lot, however or in whatever invested; and on the death (or *marriage*) of my said wife, the other third thereof in absolute property. Should he die before arriving at full age, unmarried and without issue, I direct that what is herein given to him shall be considered as included in the eighth clause of this my will.

8. All the rest and residue of my estate not herein disposed of, of every description, in possession, expectancy or action [including the estate comprehended in the second clause of this my will, upon the death (or *marriage*) of my wife] I give and devise to be equally divided among all my children living at my death, and the descendants of such of them as may be dead, subject to the qualification contained in the fifth clause of this my will.

9. I appoint my sons R. and H. executors of this my will, and I desire that they shall not be required to give security upon their qualification.

10. I appoint my wife, J. T., the guardian of my infant children until they arrive at the age of twenty-one years; provided she so long continue my widow. But if she may marry again her guardianship shall thereupon cease and determine, and in that case I appoint my sons R. and H. to be the guardians of my children in her stead.

In witness whereof I have to this my will, consisting of — sheets of paper, set my hand to each sheet, this — day of —, in the year of our Lord 192—.

T. T.

Signed, published, and declared by T. T., as and for his last will, in the presence of us, who, in his presence and at his request, have hereunto signed our names as witnesses thereto.

R. R.

W. W.

(4 Min. Inst. 1617; Dav

Whereas I, T. T., have
date, &c. Now I do hereby
as part thereof (or if the c
thus, "*I, the within named*
within will, which is to be
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will to —; and in lieu the
I do hereby give and devise,

In witness whereof I ha
of —, 192—.

Signed, published, and
to his last will, in the pres
his request, have hereunto

(4 Min. Inst. 1618. San

Be it remembered, that
192—, T. T., a mariner or
T. J., being at the time a s
the presence of us, who have
declare his last will, and did
the same as his will, as foll
wife, Mary T., should have
him; that his son J. should
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whole deposit now in arrear
his wife Mary should be his e
ing the substance accurately

In testimony whereof
writing, which contains, as
of the said T. T., made as a
— day of —, 192—.

No. 7. FORM OF MEMORANDUM
FOR PERSON MOVING
QUALIFICATION OF
OF AN A

(Pollard's Co

1. Full name of decedent.
2. Color of decedent and

3. His last place of residence _____
4. Date and place of his death _____
5. Date of Will and how to be proven _____
6. Number and dates of any codicils and how to be proven _____
7. Are these all the testamentary papers? _____
8. In whose possession were the testamentary papers at testator's death? _____
9. Name of Executor appointed by will _____
10. Full name of Administrator c. t. a., nominated and by whom nominated? _____
11. Has Executor power to sell real estate? _____
12. Value of decedent's personal estate _____ \$
13. Value of decedent's real estate _____ \$
14. Total value of decedent's real and personal estate _____ \$
15. Is the Executor relieved from giving security? _____
16. Full name of surety offered _____
17. Bond of Executor or Administrator c. t. a.,
(to be fixed by Court) _____ \$
18. Names of five appraisers:
 1. _____
 2. _____
 3. _____
 4. _____
 5. _____
19. Name of person making motion and grounds of being entitled to make it _____

Attorney for L. L.

WILLIAM AND MARY COLLEGE

For statutes as to, see Code, §§ 934-8. Women may be admitted—Acts 1918, p. 42. For general provisions as to colleges, etc., see Code, §§ 986-1003.

ZIG-ZAG COURSE

See Boundaries; Conveyance

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Cross-Reference Index

BEING

An index of all subjects treated, and of possible heads that might occur to you, with cross references to the particular subjects in this Encyclopedia where treated.

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- Continuance**—See Criminal Law and Procedure; Trials.
- Contractor**—See Architect or Builder; Licenses, etc.
- Contracts**. See also Alteration of Writing; Architect and Builder; Cancellation of Writings; Recordation or Registry.
- Contribution**—See Sureties.
- Contributory Negligence**—See Employer and Employee; Torts.
- Conversion**—See Real Estate; Trover and Conversion; Trusts and Trustees.
- Conveyance**. See also Assignment for Benefit of Creditors; Bill of Sale; Conditional Sale, or Reservation Title or Lien; Conditions in Conveyances and Wills; Contracts; Deed of Trust; Executory Limitations, or Future Estates; Fraudulent and Volun-

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- Council**—See Cities and Towns.
- Counsel**—See Attorney and Client;
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- Counterfeit**—See Forgery.
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- Criminal Proceedings**—See Crimi-
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- Currency**—See Banks and Bank-
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- Cursing**—See Profanity and
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- Adjoining Landowners; Oysters and other Shell Fish.
- Fixtures.
- Flags of the Commonwealth—See State or Commonwealth.
- Flavoring Extracts—See Intoxicating Liquors.
- Foods — See Adulteration; Brands; Pure Food and Drug Laws.
- Foods — See Adulterations; Brands; Pure Food and Drug Laws.
- Foot Bridge—See Bridges.
- Force—See Contracts; Conveyance; Rape; Will.
- Forcible Entry and Detainer—See Unlawful Entry or Detainer.
- Foreign Corporations—See Corporations.
- Foreigner—See Alien.
- Forestalling, Regrating, and Engrossing. See also Anti-trust Law.
- Forestry—See State Officers, etc.
- Forgery. See also Banks and Banking; Cheats, False Pretenses, Deceits, and Other Frauds.
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- Former Jeopardy—See Criminal Law and Procedure.
- Forms of Deeds and Covenants, etc.—See Conveyance; Deed of Trust; Landlord and Tenant; and separate titles.
- Fornication—See Adultery, Fornication, etc.
- Forthcoming Bond. See also Bonds.
- Fowls—See Animals, Fowls, etc.
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- Frauds. See also Cheats, False Pretenses, Deceits, and Other Frauds; Contracts; Conveyance; Fraudulent and Voluntary Conveyances; Set-offs; Wills.
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- Gambling or Gaming. See also Contracts.
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- Grass—See Real Estate.
- Grave Robbing—See Burying Grounds.
- Ground Rent.
- Growing Crops—See Fixtures; Landlord and Tenant; Real Estate; Sheriffs, Sergeants, etc.
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- Guaranty Companies**—See Insurance and Insurance Companies.
- Guardian and Ward.** See also Minors, etc.; Parent and Child.
- Gypsies**—See Licenses and License Taxes.
- Hampton Normal and Agricultural Institute**—See Virginia Polytechnic Institute, etc.
- Hampton Roads Port Commission**—See State Officers and Boards.
- Habens Corpus.**
- Handwriting**—See Evidence; Forgery.
- Harbor Commissioners and Masters**—See Vessels and Seamen.
- Health.** See also Nuisance; Physicians, Surgeons, and Dentists.
- Hearsay Evidence**—See Evidence.
- Heat Companies**—See Public Utility Companies.
- Heir**—See Advancement; Conveyance; Descents and Distributions; Executory Limitations, or Future Estate; Remainder; Reversion; Will.
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- Hire**—See Contracts; Employer and Employee; Liens of Mechanics and Others.
- Hobby Horses, etc.**—See Licenses and License Taxes.
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- Homicide**—See Murder; Manslaughter.
- Horse**—See Animals, etc.
- Hospitals**—See Health.
- Hotels.** See also Boarding and Eating Houses; Intoxicating Liquors; Liens of Mechanics and Others.
- Housobreaking, etc.** See also Burglary.
- House of Ill Fame**—See Adultery; Fornication, and Other Lewdness.
- House of Private Entertainment**—See Boarding and Eating Houses.
- Hunting.** See also Rewards; Trespass.
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- Incest**—See Divorce; Marriage.
- Income Tax**—See Taxation and Tax Bill.
- Increase**—See Animals, etc.
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- Indecency**—See Nuisance; Obscene Books, Pictures, and Prints.
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- Indemnity Companies**—See Insurance and Insurance Companies.
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- Indictments, etc., and Process Thereon**—See Criminal Law and Procedure.
- Indorsement**—See Bills of Exchange, or Drafts; Bonds; Negotiable Instruments; Promissory and Negotiable Notes.
- Industrial Schools**—See Minors, etc.
- Industrial Loan Association**—See Building and Loan and Industrial Loan Associations.
- Industrial Sick Benefit Companies and Associations**—See Insurance and Insurance Companies.
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- Infanticide**—See Abortion and Miscarriage; Murder.
- Informations**—See Criminal Law and Procedure.
- Inhabitant**—See Domicile and Residence.
- Inheritance Tax**—See Taxation and Tax Bill.
- Injunction**.
- Injuries**—See Torts.
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- Insane, Epileptic, Feeble-Minded and Inebriate**. See also Abduction; Criminal Law and Procedure; Monomania; Rape.
- Insignia or Society Button**.
- Insolvency**—See Assignment for Benefit of Creditors; Bankruptcy; Fraudulent and Voluntary Conveyances; Homestead and Other Exemptions.
- Inspection of Farm Products**—See Agriculture.
- Instructions**—See Trials.
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- Insurance Brokers**—See Licenses and License Taxes.
- Interest and Usury**. See also Banks and Banking; Building and Loan and Industrial Loan Associations; Credit Unions; Loans Not Over \$300.
- Interlineation**—See Alteration of Writings; Negotiable Instruments.
- Interpleader**. See also Justice of the Peace, divs. I and II.
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- Intoxicating Liquors**. See also Search Warrants.
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- Jail, Discharge From**—See Fines.
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- Joint Debtors**—See Compromise; Promissory and Negotiable Notes; Sureties.
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- Joint Tenants**—See Co-tenants.
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- Laches**—See Limitation to Remedies.
- Labor**. See also Cheats, etc.; Employer and Employee; Homestead and Other Exemptions; Liens of Mechanics and Others; Minors, etc.
- Labor Agent**—See Licenses and License Taxes.
- Laboring Man's Exemption**—See Homestead and Other Exemptions.
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- Land Office**.
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- Larceny**. See also Cheats, False Pretenses, Deceits, and Other Frauds; Embezzlement.
- Lateral Support**—See Adjoining Landowners; Easements.
- Laundries, etc.**
- "Law of the Land"**—See "Due Process of Law."
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- Lawyer**—See Attorney and Clerk.
- Lease**—See Landlord and Tenant.
- Leasehold Estates**—See Landlord and Tenant; Real Estate.
- Lectures and Literary Readings**—See Licenses and License Taxes.
- Legacy**—See Will.
- Legal Holidays**—See Public Holidays.
- Legal Tender**—See Tender.
- Legislature**—See General Assembly.
- Legislative Reference Bureau**—See State Officers and Boards.
- Legitimacy**—See Bastards; Descents and Distributions; Parent and Child.
- Letter of Attorney**—See Power of Attorney.
- Letter of Credit**.
- Levy**—See Attachments; "Distress" under Justice of the Peace, div. IV; Execution; Sheriffs, Sergeants, etc.
- Lewd and Lascivious Cohabitation**—See Adultery, Fornication, and Other Lewdness.
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- Liability and Indemnity Companies**—See Insurance and Insurance Companies.
- Libel**.
- Libraries**.
- License (on Lands)**. See also Easements.
- Licenses and License Taxes**. See also Taxation and Tax Bill.
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- ney and Client; Conditional Sale, or Reservation Title or Lien; "Distress Warrant" under Justice of the Peace; div. IV; Deed of Trust; Execution; Forthcoming Bond; Judgment; Lis Pendens; Mortgage; Recognizance; Warehouse Receipts; Vendor's Lien.
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- Life Estates**—See Landlord and Tenant; Real Estate.
- Light, Air, and Prospect**—See Easement; Real Estate.
- Light Companies**—See Public Utility Companies.
- Lightning Rod Merchant**—See Licenses and License Taxes.
- Lime**—See Adulterations; Agriculture.
- Limitation of Estates**—See Executory Limitations, or Future Estates; Real Estate; Remainder; Reversion.
- Limitations to Remedies.** See also Criminal Law and Procedure.
- Limited Partnerships**—See Partnerships (Limited).
- Lines and Courses**—See Boundaries; Conveyance.
- Liquidated Damages**—See Penalty.
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- Literary Association**—See Benevolent Association.
- Literary Fund**—See Education.
- Literary Readings**—See Licenses and License Taxes.
- Literary Society**—See Benevolent Association; By-Laws and Constitution; Disturbing Worship, Schools, and Literary Societies; Unincorporated Associations or Orders.
- Livery Stable**—See Liens of Mechanics and Others; Licenses and License Taxes.
- Live Stock**—See Common Carrier.
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- Loans Not Over \$300.** See also Banks and Banking; Building and Loan and Industrial Loan Associations; Credit Unions; Interest and Usury.
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- Lumber**—See Brands.
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- Machine**—See Automobile Law.
- Mad-dog**—See Animals.
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- Malicious Mischief**—See Torts; Trespass.
- Malicious Prosecution.**
- Mandamus.**
- Manslaughter.** See also Murder.
- Manufacturer**—See Brands.
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- Marine Insurance**—See Insurance and Insurance Companies.
- Marks**—See Brands; Trade-marks.
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- Married Woman's Property and Other Rights.** See also Alimony; Curtesy; Divorce; Dower; Marriage; Parent and Child.
- Marshalling Assets or Securities.**

- Master and Servant**—See Employer and Employee.
- Maternity Hospital**—See Minors, etc.
- Matron for Jail**—See Cities and Towns.
- Mayhem**—See Maiming or Mayhem.
- Mayor**—See Cities and Towns; Justices in Cities and Towns.
- Meal**—See Adulterations; Brands; Pure Food and Drug Laws.
- Measures**—See Weights and Measures.
- Meats**—See Adulterations; Pure Food and Drug Laws.
- Mechanical Engineer**—See Licenses and License Taxes.
- Mechanics**—See Architect and Builder; Licenses and License Taxes; Liens of Mechanics and Others.
- Mechanic's Lien**—See Liens of Mechanics and Others.
- Medical Evidence**—See Evidence.
- Medicine**—See Health; Physicians, Surgeons, and Dentists; Pure Food and Drug Laws.
- Menagerie, etc.**—See Licenses and License Taxes.
- Mercantile Agencies**—See Licenses and License Taxes.
- Merchant**—See Commission Merchant or Factor; Licenses and License Taxes.
- Merchandise Broker**—See Licenses and License Taxes.
- Mesmerism**—See Hypnotism and Mesmerism.
- Militia and Military Fund.**
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- Mills.**
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- Minerals, Analysis of**—See Agriculture.
- Mineral Water**—See Licenses and License Taxes.
- Mines**—See Adjoining Land Owners; Labor; Real Estate.
- Mining Engineer**—See Licenses and License Taxes.
- Minors, Infants, or Children.** See also Abduction; Adoption; Apprenticeship; Guardian and Ward; Juvenile and Domestic Relations Courts; Parent and Child.
- Misbranding**—See Brands; Pure Food and Drug Laws.
- Miscarriage**—See Abortion and Miscarriage.
- Misdemeanor.** See also Criminal Law and Procedure; Justice of the Peace, div. VI.
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- Mistake**—See Contracts; Conveyance; Equity.
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- Monopoly**—See Anti-trust Law.
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- Motion for Judgment Notwithstanding Verdict**—See Trials.
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- Motion in Arrest of Judgment**—See Trials.
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- Motion Picture Film Law.**
- Motor Vehicles**—See Automobile Law.
- Moving Picture Machines**—See Licenses and License Taxes.
- Municipal Corporations**—See Cities and Towns.
- Murder.** See also Manslaughter.
- Mutual Assurance Society of Virginia**—See Liens of Mechanics and Others.
- Mutual Insurance Companies Other Than Life**—See Insurance and Insurance Companies.
- Mutual Life Insurance Companies**—See Insurance and Insurance Companies.
- Name**—See Forgery; Picture or Name (Unlawful Use of); Trade-mark.

- National Bank**—See Banks and Banking.
- National Guard**—See Militia and Military Fund.
- Natural Affection**—See Contracts; Conveyance; Fraudulent and Voluntary Conveyances.
- Naturalization**—See Citizens.
- Navigation**.
- Necessaries**—See Married Woman's Property and Other Rights; Minors, etc.; Parent and Child.
- Neglected Children**—See Minors, etc.
- Negligence**—See Bailment; Common Carrier; Death By Wrongful Act; Employer and Employee; Torts.
- Negotiable Instruments**. See also Assignments; Banks and Banking; Bills of Exchange, or Drafts; Checks; Promissory and Negotiable Notes.
- Negro**—See Colored Person.
- New Trial**—See Criminal Law and Procedure; Justice of the Peace; Trials.
- "Newsbutch"**—See Licenses and License Taxes.
- Newspaper**. See also Libel.
- Non-residence**—See Domicile and Residence; United States Constitution.
- Non-stock Companies**—See Corporations; Insurance and Insurance Companies.
- Nonsuit**—See Trials.
- Non-support**—See Desertion and Non-support.
- Notary Public**. See also Acknowledgments; Affidavits; Depositions; Justice of the Peace, div. VIII ("Peace and Good Behavior").
- Notice**. See also Corporations; Depositions; Motions; Negotiable Instruments; "Unlawful Entry or Detainer" under Justice of the Peace, div. III; and Other particular titles.
- Notice of Dishonor**—See Bills of Exchange, or Drafts; Negotiable Instruments.
- Notice to Quit**—See "Unlawful Entry or Detainer" under Justice of the Peace, div. III.
- Novation of Debts**.
- Nuisance**.
- Norfolk**—See Courts of Richmond, Norfolk, and Roanoke.
- Oaths and Bonds**. See also Affidavits; Officers (County, City, and District).
- Obligation of Contracts**—See Contracts; Statutes.
- Obscene Books, Pictures, and Prints**.
- Obstructing Highways**—See Nuisance.
- Obstruction of Justice**. See also Bribery; Compounding or Concealing Crimes; Escape, Rescue, and Breach of Prison; Jurors (Offenses Concerning); Lobbying; Officers (Disobedience by or of).
- Obstruction of Water Courses**—See Nuisance.
- Odd Fellows**—See Benevolent Associations; Unincorporated Associations or Orders.
- Offer**—See Tender.
- Offensive Industries**—See Nuisance.
- Office (Disabilities to Hold)**.
- Office Judgment**.
- Officers Corruptly Summoning Jurors**—See Jurors, etc.
- Officers (County, City and District)**. See also Elections; Oaths and Bonds; Ouster Law; Sheriffs, Sergeants, Constables, Coroners, and Criers.
- Officers (Disobedience by or of)**. See also Contempts; Obstruction of Justice.
- Officers Falsifying or Destroying Records**—See Records (Offenses Concerning).
- Officers, State**—See State Officers and Boards.
- Offset**—See Set-off.
- Offspring**—See Animals, etc.
- Oil and Gas**—See Real Estate.
- Old Documents**—See Evidence.
- Oleomargarine**—See Brands.
- Opening Statement to Jury**—See Trials.

- Opinion**—See Evidence.
Option—See Contracts.
Orchards, etc. (Protection Against Diseases).
Order of Publication.
Orders or Lodges—See Benevolent Associations; Corporations; Insurance and Insurance Companies; Suits and Action; Unincorporated Associations or Orders.
Ouster Law.
Out of Date—See Limitations to Remedies.
Overseers, and Superintendent of the Poor.
Overt Act—See Attempts to Commit Crime.
Ownership—See Animals, etc.; Bailment; Real Estate.
Oysters and Other Shell Fish. See also Licenses and License Taxes.

Packer—See Brands.
Paints, Turpentine, and Linseed Oil.
Pandering, or "White Slave Traffic"—See Adultery, Fornication, and other Lewdness.
Parceners—See Co-tenants.
Pardon.
Parent and Child. See also Desertion and Non-support; Guardian and Ward; Minors, etc.
Parks—See Cities and Towns; Licenses and License Taxes.
Parliamentary Law. See also By-laws and Constitution.
Parcel Gift—See Gifts of Personal Property.
Parties—See Parties (Change of); Suits and Actions.
Parties (Change of).
Partition. See also Adjoining Landowners.
Partnerships. See also Partition.
Partnerships (Limited).
Part-owners—See Co-tenants; Partition.
Party Wall—See Adjoining Landowners; Easements.
Passengers—See Carriers (Private); Common Carrier.
Patents—See Brands; Copy-
rights; Labels or Prints; Trade-marks.
Paupers—See Overseers, etc. of the Poor.
Pawn—See Bailment; Mortgage.
Pawnbrokers—See Licenses and License Taxes.
Payments. See also Application of Payments; Compromise; Novation of Debts; Set-offs.
Payment into Court—See Payment.
Peace and Good Behavior—See Justice of the Peace, div. VIII.
Peddlers—See Licenses and License Taxes.
Penalty.
Penitentiary. See also Convicts.
Pensions.
Performances, Exhibitions, etc.—See Licenses and License Taxes.
Perjury.
Perpetuity—See Executory Limitations, or Future Estate.
Person, Re-capture of—See Re-capture of Property or Person.
Personal Property—See Bill of Sale; Conditional Sale, etc.; Fixtures; Gift of Personal Property; Recordation or Registry; Sale or Exchange of Personal Property.
Personal Representatives—See Administrators and Executors.
Petitions (Forms of).
Petit Larceny—See Larceny.
Pews—See Easements.
Pharmacy—See Health; Pure Food and Drug Laws.
Phonographs—See Licenses and License Taxes.
Photographers—See Licenses and License Taxes.
Physicians, Surgeons, and Dentists. See also Health; Licenses and License Taxes.
Picture or Name (Unlawful Use of).
Picture or Prints—See Motion Picture Film Law; and Obscene Books, Pictures, and Prints.
Pilots—See Vessels and Seamen.

- Pistols, Dirks, and Bowie Knives**—See Weapons.
- Pits or Well-Holes.**
- Place of Contract**—See Contracts.
- Place of Enforcement**—See Suits and Actions.
- Place Where Located**—See Contracts; Will.
- Place of Suit**—See Suits and Actions.
- Pleas**—See Criminal Law and Procedure; Pleading and Its Incidents.
- Pleading and Its Incidents.** See also Criminal Law and Procedure; Payment; Set-off.
- Pledge**—See Bailment; Conditional Sale, etc.; Deed of Trust; Licenses and License Taxes (subject "Pawnbrokers"); Mortgage; Promissory and Negotiable Notes.
- Poison**—See Medicine.
- Police**—See Disturbing Worship, Schools, and Literary Societies; Justice of the Peace, div. VIII.
- Police Justices**—See Justices in Cities and Towns.
- Police Powers**—See Interstate Commerce.
- Policy**—See Insurance and Insurance Companies.
- Poll Tax**—See Elections; Taxation and Tax Bill.
- Pollution of Streams**—See Health.
- Poor**—See Overseers, etc., of the Poor.
- Poor Debtor's Exemption**—See Homestead and Other Exemptions.
- Posse Comitatus**—See Sheriffs, Sergeants, etc.
- Possession**—See Adverse Possession.
- Posthumous Child**—See Descents and Distributions; Will.
- Potatoes.**
- Poultry Feed and Powders**—See Agriculture; Pure Food and Drug Laws.
- Power Companies**—See Public Utility Companies.
- Power of Appointment.**
- Power of Attorney.** See also Agents and Agency.
- Preferring Creditors**—See Assignment for Benefit of Creditors.
- Premium**—See Insurance and Insurance Companies.
- President of Societies, etc.**—See By-laws and Constitution; Parliamentary Law.
- Prescription**—See Adverse Possession; Easements; Limitations to Remedies.
- Presentments**—See Criminal Law and Procedure; Incidents, Presentments, etc., and Process Thereon.
- Presumption**—See Criminal Law and Procedure; Death (Presumption of); Evidence; Limitations to Remedies.
- Pretermitted Children**—See Descents and Distributions; Will.
- Prevention of Crimes**—See Justice of the Peace, div. VIII (as to "Peace and Good Behavior").
- Prices, Enhancing**—See Anti-trust Law; Forestalling, Regrading, and Engrossing.
- Primary Elections**—See Elections.
- Principal**—See Agents and Agency; Criminal Law and Procedure.
- Prints**—See Labels or Prints; Obscene Books, Pictures, and Prints.
- Priority**—See Deed of Trust; Mortgage; Recordation or Registry.
- Prison Breach**—See Escape, Rescue, and Breach of Prison.
- Prisoner**—See Escape, Rescue, etc.
- Private Property, Taking or Damaging**—See Eminent Domain.
- Privilege Communications**—See Evidence.
- Privilege From Arrest**—See Arrest.
- Privilege (on Lands)**—See License (on Lands).
- Prize Fighting**—See Criminal Law and Procedures.
- Probate**—See Will.
- Probation Officers.** See also Juvenal and Domestic Rela-

- tions Courts; Minors, etc., section 30; and State and Other Boards of Public Welfare.
- Process.** See also Corporations; Sheriffs, Sergeants, etc.
- Produce, Enhancing Price of—**See Forestalling, Regrading, etc.
- Profanity and Drunkenness.** See also Abusive Language.
- Professional Nurse—**See Health.
- Profits or Increase—**See Animals, etc.
- Prohibition Act—**See Intoxicating Liquors.
- Prohibition (Writ of).**
- Promise of Marriage—**See Breach of Promise to Marry; Marriage.
- Promissory and Negotiable Notes.** See also Bonds.
- Promoters—**See Corporations.
- Proof—**See Evidence.
- Property, Re-Capturing—**See Recapture of Property or Person.
- Prosecutor—**See Criminal Law and Procedure.
- Prostitution and Prostitutes—**See Abduction; Adultery. Fornication, and Other Lewdness.
- Protest—**See Bills of Exchange, or Drafts; Negotiable Instruments.
- Proxy—**See Corporations.
- Publication—**See Notice; Order of Publication.
- Public Debt—**See State or Commonwealth.
- Public Defender—**See Cities and Towns.
- Public Health—**See Health.
- Public Highway—**See Roads, Bridges, etc.
- Public Holidays.**
- Public Nuisance—**See Nuisance.
- Public Officers—**See Officers (County, City, and District); Officers (Disturbances by and of); Sheriffs, Sergeants, etc.; State Officers, etc.
- Public Performances, Exhibitions, etc.—**See Licenses and License Taxes.
- Public Roads—**See Roads, Bridges, etc.
- Public Rooms—**See Licenses and License Taxes.
- Public Service Corporations—**See Corporations.
- Public Utility Companies—**See Corporations; Taxation and Tax Bill.
- Public Worship (Disturbing)—**See Disturbing Worship, etc.
- Punishment—**See Criminal Law and Procedure.
- Pupil—**See Education.
- Purchase—**See Bill of Sale; Conditional Sale, etc.; Contracts; Conveyance; Fraudulent and Voluntary Conveyances; Sale or Exchange of Personal Property.
- Purchase Money—**See Vendor's Lien.
- Pure Food and Drug Laws.** See also Adulterations.
- Quarantine—**See Health.
- Quash—**See Attachments; Execution.
- Quit Claim Deed—**See Conveyance.
- Quorum—**See By-laws and Constitution; Corporations; Parliamentary Law.
- Quo Warranto.**
- Raffling—**See Gambling or Gaming.
- Railroads and Railroad Companies.** See also Common Carrier; Corporations; Death by Wrongful Act, etc.; Eminent Domain; Employer and Employee; Taxation and Tax Bill.
- Rain Water—**See Easements.
- Rape.** See also Attempts to Commit Crime.
- Repairs—**See Improvements; Liens of Mechanics and Others.
- Ratification—**See Agents and Agency; Minors, etc.; Parent and Child.
- Real Estate.** See also Adjoining Landowners; Adversary Possession; Conveyance; Cur-

- tesy; Deed of Trust; Delinquent Tax Sales; Dower; Easements; Fences, Fixtures; Justice of the Peace, div. III (as to "Unlawful Detainer") and div. IV. (as to "Distress Warrant"); Landlord and Tenant; License (on Lands); Liens of Mechanics and Others; Mortgage; Real Estate Agent; Recordation or Registry; Trusts and Trustees; Vendor's Lien.
- Real Estate Agent.** See also Agents and Agency; Brokers; Licenses and License Taxes.
- Re-capture of Property or Person.**
- Receipt.**
- Receivers.**
- Receiving Stolen Goods—**See Larceny.
- Recognizance—**See Criminal Law and Procedure; Justice of the Peace, div. VIII ("Peace and Good Behavior").
- Recordation or Registry.** See also Acknowledgments.
- Records (Offenses Concerning).** See also Forgery.
- Recoupment—**See Set-offs.
- Recoveries of Money—**See Justice of the Peace, div. I; Motions; Trials.
- Recreation Centers and Home-Crafts.**
- Re-entry—**See Landlord and Tenant.
- Referee—**See Bankruptcy.
- Refunding Bond—**See Administrators and Executors; Bonds.
- Register of the Land Office—**See State Officers, etc.
- Registration of Voters—**See Elections.
- Re-hearing—**See Pleading and Its Incidents.
- Release Deed—**See Conveyance.
- Religion—**See Church and Church Property; Disturbing Worship, etc.; Nuisance.
- Religious Meetings—**See Disturbing Worship, etc.
- Religious Societies—**See Corporations; Church and Church Property; Unincorporated Associations or Orders.
- Religious Trusts—**See Trusts and Trustees.
- Remainder.**
- Removal of Causes.**
- Rent—**See Apportionment; Ground Rent; Landlord and Tenant.
- Rental or Land Agent—**See Licenses and License Taxes.
- Repairs—**See Liens of Mechanics and Others.
- Replevin.**
- Replication—**See Pleading, etc.
- Representation in Congress—**See Elections.
- Reprieve—**See Pardon.
- Repugnancy—**See Pleading, etc.
- Reputation—**See Abusive Language; Adultery; Fornication, and Other Lewdness; Blackmailing; Evidence; Extortion; Libel; Rape; Seduction; Slander.
- Rescission of Contracts.** See also Cancellation of Writings; Sale or Exchange of Personal Property; Specific Performance.
- Resisting an Officer—**See Contempts; Obstruction of Justice.
- Rescue—**See Escape, Rescue, etc. See Elections.
- Reservation of Title or Lien—**See Conditional Sale, or Reservation Title or Lien.
- Residence—**See Domicile and Residence.
- Restaurant—**See Boarding and Eating Houses.
- Restraint of Trade—**See Contracts.
- Resulting Trusts—**See Trusts and Trustees.
- Retrospective Laws—**See Statutes.
- Return Day—**See Process.
- Returns—**See Justice of the Peace, and Sheriffs, Sergeants, etc., forms Nos. 12 to 26.
- Rovenuue—**See Assessment of Taxes; Licenses and License Taxes; Taxation and Tax Bill.
- Reversion—**See Real Estate.

- Revival**—See Parties (Change of); Trials.
- Revocation**—See Agents and Agency; Attorney and Client; Licenses and License Taxes; Power of Appointment; Power of Attorney.
- Rewards.**
- Richmond**—See Courts of Richmond, etc.
- Right of Way**—See Easements; Roads, Bridges, etc.
- Riot, Rout, and Unlawful Assembly.**
- Riparian Owners**—See Adjoining Landowners; Easements; Real Estate; Water and Water Courses.
- Rivers**—See Health; Nuisance; Water and Water Courses.
- Roads, Bridges, Landings, and Wharves.** See also Bridges; Chain Gangs.
- Roanoke**—See Courts of Richmond, Norfolk, and Roanoke.
- Robbery.** See also Extortion.
- Rout**—See Riot, Rout, and Unlawful Assembly; Sheriffs, Sergeants, etc.
- Rules and Rule-Days.**
- Salaries of State Officers**—See State Officers, etc.
- Sale**—See Auction and Auctioneer; Bill of Sale; Contracts; Guardian and Ward; Judicial Sale; Minors, etc.; Sale or Exchange of Personal Property.
- Sale or Exchange of Personal Property.** See also Bill of Sale; Conditional Sale, or Reservation Title or Lien; Contracts; Recordation or Registry.
- Sale or Leasing Lands of Persons under Disability**—See Guardian and Ward; Minors, etc.
- Salt**—See Brands.
- Savings Banks**—See Banks and Banking.
- Saw Logs**—See Brands.
- Scandal**—See Libel; Nuisance; Slander.
- School Leagues**—See Benevolent Associations; Unincorporated Associations or Orders.
- Schools**—See Disturbing Worship, Schools, and Literary Societies; Education.
- Scroll**—See Bonds; Conveyance; Taxation and Tax Bill.
- Seal**—See Bonds; Conveyance; Taxation and Tax Bill.
- Seals of the Commonwealth**—See State or Commonwealth.
- Seamen**—See Vessels and Seamen.
- Search Warrant.** See also Justice of the Peace, div. IX; Intoxicating Liquors.
- Secretary of the Commonwealth**—See Fees of Officers, etc.; State Officers, etc.
- Securities, Unlawful Dealing In**—See Gambling or Gaming.
- Security Companies**—See Insurance and Insurance Companies.
- Seduction.** See also Adultery, Fornication, etc.
- Seeds**—See Agriculture.
- Segregation for Taxation**—See Taxation and Taxation.
- Segregation of Races**—See Common Carrier.
- Self-defense**—See Assault and Battery; Murder.
- Separation**—See Divorce; Marriage.
- Sepulture, Violation of**—See Burying Grounds.
- Sergeants**—See Cities and Towns; Sheriffs, Sergeants, etc.
- Servant and Master**—See Employer and Employee.
- Set-off.** See also Recoupment.
- Settlement**—See Accord and Satisfaction; Compromise; Compounding or Concealing Crime.
- Sewing Machine Dealers and Agents**—See Licenses and License Taxes.
- Sheep**—See Animals, Fowls, etc.; Brands.
- Sheep-killing Dogs**—See Animals, etc.; Dogs.
- Shelley's Case**—See Remainder.
- Sheriffs, Sergeants, Coroners,**

- Constables, and Criers.** See also Ouster Law.
- Ship**—See Arson and Other Burnings, etc.; Housebreaking, etc.
- Shooting**—See Animals, Fowls, etc.; Maiming or Mayhem.
- Shows, Exhibition, etc.**—See Licenses and License Taxes.
- Sick Benefit Companies and Associations**—See Insurance and Insurance Companies.
- Sidewalks**—See Cities and Towns; Roads, Bridges, etc.
- Signature**—See Contracts; Conveyances; Will.
- Siphons, etc.**—See Brands.
- Silence**—See Contracts; Evidence.
- Simple Larceny**—See Larceny.
- Skating Rink**—See Licenses and License Taxes.
- Slander.** See also Libel.
- Slot Machine**—See Licenses and License Taxes.
- Small Loans**—See Loans not over \$300.
- Smallpox.** See also Health.
- Social Clubs**—See By-laws and Constitution; Corporations; Licenses and License Taxes; Unincorporated Associations or Orders.
- Societies, Orders, or Lodges**—See Corporations; Insignia or Society Button; Insurance or Insurance Companies; Unincorporated Associations or Orders.
- Sodomy**—See Buggery.
- Soft Drinks**—See Intoxicating Liquors; Licenses and License Taxes.
- Soil, Analysis of**—See Agriculture.
- Sons of Temperance**—See Benevolent Associations; Unincorporated Associations or Orders.
- Soundness**—See Sale or Exchange of Personal Property.
- Southern Cross of Honor**—See Insignia or Society Button.
- Spark Arrester**—See Railroads and Railroad Companies.
- Special Commissioner.**
- Special Police**—See Justice of the Peace, div. VIII.
- Specialty**—See Bonds.
- Special Verdict**—See Trials.
- Specific Performance.**
- Spendthrift Trusts**—See Trusts and Trustees.
- Spring**—See Health.
- Stabbing**—See Maiming or Mayhem.
- Stake-holder**—See Bailment.
- Stallion, Jackass, or Bull**—See Animals, etc.; Liens of Mechanics, and Others; Licenses and License Taxes.
- Starvation, Death by**—See Murder.
- State Accountant and State Board of Accountancy**—See State Officers and Boards.
- State and Other Boards of Public Welfare**—See Minors, etc., § 37, (6).
- State Board of Crop Pest Commissioners**—See Orchards (Protection Against Diseases); and State Officers and Boards.
- State Board of Education**—See Education; State Officers and Boards.
- State Board of Health**—See Health; State Officers and Boards.
- State Convict Road Force**—See Capias; Chain Gang; Roads, Bridges, etc.
- State Corporation Commission.** See also Corporations.
- State Forester**—See State Officers, etc.
- State Highway System**—See Roads, Bridges, etc.
- State Livestock Sanitary Board**—See Agriculture; State Officers and Boards.
- State Normal Schools.** See also Education.
- State Officers and Boards.**
- State or Commonwealth.** See also State Officers and Boards.
- State Tax Board and Examiner of Records**—See Taxation and Tax Bill.

- Stay of Execution**—See Execution.
- Stealing**—See Larceny.
- Steamboats**—See Steamships and Steamboats.
- Steamships and Steamboats**. See also Common Carrier; Corporations; Death by Wrongful Act, etc.; Taxation and Tax Bill.
- Sterility or Impotency**—See Divorce.
- Stock**—See Animals, etc.
- Stock and Poultry Feed and Powders**—See Agriculture; Pure Food and Drug Laws.
- Stock Breeders**—See Liens of Mechanics and others.
- Stock Brokers**—See Licenses and License Taxes.
- Stoppage in Transitu**—See Common Carrier; Sale or Exchange of Personal Property.
- Storage and Impounding**—See Common Carrier; Licenses and License Taxes; Liens of Mechanics and others.
- Strangulation**—See Murder.
- Straw**—See Arson and other Burnings, etc.
- Steam, Polluting**—See Health; Water and Water Courses.
- Street Cars**—See Cities and Towns.
- Streets**—See Cities and Towns.
- Street Vendors**—See Licenses and License Taxes.
- Strikes**.
- Sublease**—See Landlord and Tenant.
- Subornation of Perjury**—See Perjury.
- Subpoena**—See Notice; Process.
- Subpoena Duas Tecum**.
- Subrogation**—See Sureties.
- Subscribing Witnesses**—See Will.
- Subscriptions**—See Corporations.
- Substitution**—See Sureties.
- Suicide**—See Murder.
- Suits and Actions**. See also Motions for Money; Removal of Causes; Taxation and Tax Bill; and particular titles.
- Summary Proceedings**—See Contempts; Justice of the Peace.
- Summons**—See Notice; Process.
- Sunday**. See also Common Carrier; Public Holidays; Weapons.
- Superintendent of Printing, etc**—See State Officers, etc.
- Superintendent of Public Instruction**—See Education; State Officers, etc.
- Superintendent of the Poor**—See Board of Supervisors; overseers, and Superintendent of the Poor.
- Supersedeas**—See Appeals.
- Supervisors**—See Board of Supervisors.
- Supply Lien**—See Liens of Mechanics and others.
- Support**—See Alimony; Easements.
- Supreme Court of Appeals**—See Appeals.
- Sureties**.
- Surgeon**—See Physicians, Surgeons, and Dentists.
- Surveyor (County)**. See also Board of Supervisors; Fees of Officers, etc.
- Survivor**—See Co-Tenants.
- Suspending Bond**—See Interpleader.
- Swearing**—See Evidence; Oaths and Bonds; Drunkenness and Profanity.
- Taxation and Tax Bill**. See also Assessment of Taxes; Delinquent Tax Sale; Erroneous Assessments; Licenses and License Taxes.
- Tax Bill**—See Taxation and Tax Bill.
- Tax Sale**—See Delinquent Tax Sale.
- Teacher**—See Education.
- Telegraph and Telephone Companies**. See also Corporations; Taxation and Tax Bill.
- Telephone Companies**—See Telegraph and Telephone Companies.
- Tenant**—See Landlord and Tenant.
- Tenant at Will or by Sufferance**—See Landlord and Tenant.
- Tenant for Years**—See Landlord and Tenant.

- Tenant from Year to Year, Month to Month, etc.**—See Landlord and Tenant
- Tenants in Common**—See Co-Tenants
- Tenants in Entireties**—See Co-Tenants
- Tender.**
- Tenements**—See Real Estate
- Terrapins**—See Oysters and other shell fish
- Testimony**—See Evidence
- Theatre**—See Licenses and License Taxes
- Threats**—See Abusive Language; Extortion; Justice of the Peace, div. VIII ("Peace and Good Behavior"); Obstruction of Justice; Robbery
- Timber**—See Brands; Contracts; Fixtures; Real Estate
- Time**—See Contracts; Holidays; Negotiable Instruments; Notice; Statutes
- Tinware**—See Brands
- Title**—See Contracts; Conveyance
- Tobacco.** See also Agriculture; Brands; Licenses and License Taxes
- Toll-Bridge**—See Bridges
- Tombstone** — See Burying Grounds; Easements; Trespass
- Torts.** See also Adultery, Fornication, and other Lewdness; Agents and Agency; Animals, Fowls, etc.; Assault and Battery; Bailments; Cheats, False Pretences, Deceits, and other Frauds; Cities and Towns; Carriers (private); Common Carrier; Death by Wrongful Act, etc.; Detinue; Employer and Employee; Fraud; Habeas Corpus; License (on Lands); Libel; Malicious Prosecution; Marriage; Nuisance; Railroads and Railroad Companies; Real Estate; Recapture of Property or Person; Seduction; Slander; Trespass; Trower and Conversion.
- Towns**—See Cities and Towns
- Toy Firearms**—See Weapons
- Trade-Marks.** See also Brands; Copyrights; Patents
- Transmission Companies**—See Corporations; Eminent Domain; State Corporation Commission; Telegraph and Telephone Companies
- Transportation Companies**—See Canals and Canal Companies; Common Carrier; Corporations Eminent Domain; Express Company; Railroads and Railroad Companies; State Corporation Commission; Steamships and Steamboats.
- Treason.**
- Treasurers (County and City).**
- Treasury, Auditors, and Treasurer.**
- Trees**—See Adjoining Landowners; Orchards (Protection against Diseases); Real Estate.
- Trespass.** See also Animals, etc.
- Trial Justice**—See Justice of the Peace.
- Trials.** See also Criminal Law and Procedure; Pleading and its Incidents
- Trusts**—See Anti-Trust Law
- Trusts and Trustees.** See also Deed of Trust
- Trust Companies**—See Banks and Banking
- Tumult**—See Riot, Rout, and Unlawful Assembly
- "Twice in Jeopardy"**—See Criminal Law and Procedure
- Underlot**—See Landlord and Tenant
- Undertakers**—See Licenses and License Taxes
- Undue Influence**—See Contracts; Conveyance; Will.
- Unincorporated Associations or Orders.** See also Benevolent Associations
- United States Constitution**
- University of Virginia**
- Unlawful Assembly**—See Riot, Rout, and Unlawful Assembly
- Unlawful Entry or Detainer.** See also Justice of the Peace, div. III
- Unrecorded Writings**—See Bill

- of Sale; Chattel Mortgage; Conditional Sale, or Reservation Title or Lien; Contracts; Conveyance; Deed of Trust; Fraudulent and Voluntary Conveyances; Mortgage; Recordation or Registry.
- Unsound Mind**—See Contracts; Insane, etc.; Will
- Usage**—See Common Law; Contracts
- Usury**—See Interest and Usury
- Vague and Indefinite Trusts**—See Trusts and Trustees.
- Vagrants**—See Beggars
- Valuable Consideration**—See Contracts; Conveyance; Fraudulent and Voluntary Conveyances
- Vehicles**—See Automobile Law
- Venue**—See Criminal Law and Procedure
- Venue**—See Criminal Law and Procedure; Trials
- Verdict**—See Criminal Law and Procedure; Trials
- Vessels and Seamen**
- Vendors**—See Licenses and License Taxes
- Vendor's Lien**
- Veterinary Medicine and Surgery**—See Agriculture; Licenses and License Taxes
- Viaduct Companies**—See Public Utility Companies.
- Vicious Animals**—See Animals, etc.
- Vinegar**—See Adulterations; Brands; Intoxicating Liquors; Pure Food and Drug Laws
- Violation of Sepulture**—See Burying-Grounds
- Virginia Agricultural and Mechanical College**—See Virginia Polytechnic Institute, etc.
- Virginia Council of Defense**—See Militia and Military Fund
- Virginia Military Institute**
- Virginia Normal and Industrial Institute**—See State Normal Schools
- Virginia Polytechnic Institute, etc.**
- Visitors of State Institutions**—See State Officers and Boards
- Vital Statistics**—See Health
- Vocational Rehabilitation of Injured Employees**—See Employer and Employee
- Voluntary Conveyance**—See Fraudulent and Voluntary Conveyances
- Voters**—See Elections.
- Wager**—See Contracts; Gambling or Gaming.
- Wages**—See Contracts; Employer and Employee; Homestead and other Exemptions; Labor; Liens of Mechanics and Others; Minors, etc.
- War**—See Militia and Military Fund
- Ward**—See Guardian and Ward
- Warehouse Receipts**
- Warrants for Small Claims**—See Justice of the Peace, div. I.
- Warranty**—See Conveyance; Sale or Exchange of Personal Property
- Waste**—See Landlord and Tenant
- Waste and Unappropriated Lands**
- Water and Water Courses**. See also Easements; Nuisance; Real Estate
- Water Companies**—See Public Utility Companies
- Way**—See Easements; Roads, Bridges, etc.
- Way-Going Crop**—See Fixtures; Real Estate
- Weak-Mindedness**—See Insane, etc.; Will
- Weapons**
- Weights and Measures**
- Well-Holes**—See Pits or Well-Holes.
- Wharf**—See Roads, Bridges, Landings, and Wharves
- "White Slave Traffic"**—See Adultery, Fornication, and other Lewdness
- Widow**—See Descents and Distributions; Dower; Homestead and other Exemptions; Married Woman's Property and other Rights; Will
- Wife**—See Alimony; Curtesy; Divorce; Dower; Evidence;

- Married Woman's Property** and other Rights; Marriage
Wild Animals—See Animals, etc.
Will. See also Administrators and Executors; Advancements; Conditions in Conveyances and Will; Conveyance; Descents and Distributions; Dower; Power of Appointment; Remainder; Taxation and Tax Bill
William and Mary College
Window—See Easements
Wine—See Intoxicating Liquors
Witness—See Evidence; Fees of Officers and Witnesses; Justice of the Peace, div. X ("Costs Before a Justice").
Women—See Married Woman's Property and other Rights
Workmen's Compensation Law—See Employer and Employee.
- Wounding**—See Maiming or Mayhem
Wrecks—See Finding Property; Vessels and Seamen
Writings—See Alteration of Writings; Cancellation of Writings
Writ of Error—See Appeals
Wrongful Death—See Death by Wrongful Act, etc.
Wrongs—See Torts
- X-Ray**—See Physicians, Surgeons, and Dentists
- Year to Year, Leasing From**—See Landlord and Tenant.
- Zig-Zag Course**—See Boundaries; Conveyance.

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